

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,

Plaintiff,

Civil Action
No. 14-14176-ADB

v.

February 13, 2019

PRESIDENT AND FELLOWS OF HARVARD
COLLEGE, et al.,

Pages 1 to 129

Defendants.

TRANSCRIPT OF CLOSING ARGUMENTS
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

JOAN M. DALY, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 5507
Boston, MA 02210
joanmdaly62@gmail.com

1 **APPEARANCES:**

2 **COUNSEL FOR THE PLAINTIFF:**

3
4 ADAM K. MORTARA, ESQUIRE
5 J. SCOTT McBRIDE, ESQUIRE
6 KRISTA J. PERRY, ESQUIRE
7 Bartlit Beck Herman Palenchar & Scott
8 54 West Hubbard Street
9 Suite 300
10 Chicago, Illinois 60654
11 312.494.4400
12 adam.mortara@bartlit-beck.com
13 scott.mcbride@bartlit-beck.com
14 krista.perry@bartlit-beck.com

15 JOHN M. HUGHES, ESQUIRE
16 MEG E. FASULO, ESQUIRE
17 Bartlit Beck Herman Palenchar & Scott
18 1801 Wewatta Street
19 Suite 1200
20 Denver, Colorado 80202
21 303.592.3100
22 john.hughes@bartlit-beck.com
23 meg.fasulo@bartlit-beck.com

24 JOHN MICHAEL CONNOLLY, ESQUIRE
25 THOMAS R. MCCARTHY, ESQUIRE
 WILLIAM S. CONSOVOY, ESQUIRE
 CAMERON T. NORRIS, ESQUIRE
 Consovoy McCarthy Park PLLC
 3033 Wilson Boulevard
 Suite 700
 Arlington, Virginia 22201
 703.243.9423
 mike@consovoymccarthy.com
 tom@consovoymccarthy.com
 will@consovoymccarthy.com

1 **APPEARANCES (cont.):**

2 **PATRICK STRAWBRIDGE, ESQUIRE**
3 **Consovoy McCarthy Park PLLC**
4 **Ten Post Office Square**
5 **8th Floor, South, PMB #706**
6 **Boston, Massachusetts 02109**
7 **617.227.0548**
8 **patrick@consovoymccarthy.com**

9 **COUNSEL FOR THE DEFENDANT:**

10 **WILLIAM F. LEE, ESQUIRE**
11 **FELICIA H. ELLSWORTH, ESQUIRE**
12 **ANDREW S. DULBERG, ESQUIRE**
13 **ELIZABETH C. MOONEY, ESQUIRE**
14 **SARAH R. FRAZIER, ESQUIRE**
15 **Wilmer Cutler Pickering Hale and Dorr LLP**
16 **60 State Street**
17 **Boston, Massachusetts 02109**
18 **617.526.6556**
19 **william.lee@wilmerhale.com**
20 **felicia.ellsworth@wilmerhale.com**
21 **andrew.dulberg@wilmerhale.com**
22 **elizabeth.mooney@wilmerhale.com**
23 **sarah.frazier@wilmerhale.com**

24 **SETH P. WAXMAN, ESQUIRE**
25 **DANIELLE CONLEY, ESQUIRE**
26 **DANIEL WINIK, ESQUIRE**
27 **Wilmer Cutler Pickering Hale and Dorr LLP**
28 **1875 Pennsylvania Ave, NW**
29 **Washington, DC 20006**
30 **202.663.6006**
31 **seth.waxman@wilmerhale.com**
32 **danielle.conley@wilmerhale.com**
33 **daniel.winik@wilmerhale.com**

34 **DEBO P. ADEGBILE, ESQUIRE**
35 **Wilmer Cutler Pickering Hale and Dorr LLP**
36 **7 World Trade Center**
37 **250 Greenwich Street**
38 **New York, New York 10007**
39 **212.295.6717**
40 **debo.adegbile@wilmerhale.com**

1 APPEARANCES (cont.):

2 ARA B. GERSHENGORN, ESQUIRE
3 ROBERT IULIANO, ESQUIRE
4 Harvard Office of the General Counsel
5 Smith Campus Center, Suite 980
6 1350 Massachusetts Avenue
7 Cambridge, Massachusetts 02138
617.495.8210
ara_gershengorn@harvard.edu
Robert_iuliano@harvard.edu

8 COUNSEL FOR AMICI STUDENTS:

9 JON M. GREENBAUM, ESQUIRE
10 BRENDA L. SHUM, ESQUIRE
11 GENEVIEVE BONADIES TORRES, ESQUIRE
12 1500 K Street NW, Suite 900
13 Washington, DC 20005
202.662.8315
jgreenbaum@lawyerscommittee.org
bshum@lawyerscommittee.org
gtorres@lawyerscommittee.org

14 EMMA DINAN, ESQUIRE
15 Arnold & Porter LLP
16 555 Twelfth Street, NW
17 Washington, DC 20004
202.942.5477
emma.dinan@aporter.com

18 COUNSEL FOR AMICI ORGANIZATIONS:

19 JENNIFER A. HOLMES, ESQUIRE
20 CARA McCLELLAN, ESQUIRE
21 MICHAEL M. TURNAGE YOUNG, ESQUIRE
22 RACHEL N. KLEINMAN, ESQUIRE
23 CATHERINE BULLOCK, ESQUIRE
24 NAACP Legal Defense and Educational Fund, Inc.
25 700 14th Street NW, Suite 600
Washington, DC 20005
jholmes@naacpldf.org
cmccllellan@naacpldf.org
mturnageyoung@naacpldf.org
rkleinman@naacpldf.org

1 **APPEARANCES (cont.):**

2 **KATE R. COOK, ESQUIRE**
3 **Sugarman Rogers**
4 **101 Merrimac Street**
5 **Suite 900**
6 **Boston, Massachusetts 02114**
7 **617.227.3030**
8 **cook@sugarmanrogers.com**

P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Allison D. Burroughs, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on February 13, 2019.)

THE CLERK: All rise. Court is in session. Please be seated. This is Civil Action 14-14176, Students for Fair Admissions.

Will counsel identify yourselves for the record.

MR. MORTARA: Your Honor, Adam Mortara for Students for Fair Admissions. With me are my colleagues Will Consovoy, John Hughes, Meg Fasulo, Michael Connolly, Cameron Norris, Patrick Strawbridge, *Thomas McCarthy*, Krista Perry, and Scott McBride. Excused absences for Ms. Hacker, who is full-term now and cannot travel, and Mr. Michael Park who had the great honor of appearing in front of the Senate Judiciary Committee this morning in connection with his nomination to the United States Court of Appeals for The Second Circuit.

MR. LEE: Good afternoon, Your Honor. Bill Lee from Wilmer Hale for Harvard. With me are my partners Seth Waxman, Danielle Conley, Felicia Ellsworth, Debo Adegbile and Daniel Winik. And from Harvard, Bob Iuliano and Ara Gershengorn.

1 MS. TORRES: Good afternoon, Your Honor. Genevieve
2 Bonadies --

3 THE COURT: I knew you were here someplace.

4 MS. TORRES: Genevieve Bonadies Torres representing
5 the student Amici in this case. From the Lawyers Committee,
6 I'm joined by Brenda Shum and Jon Greenbaum. And I am joined
7 by my colleagues at Asian Americans Advancing Justice, Nicole
8 Gon Ochi and Arnold & Porter -- somebody. Thank you.

9 MS. HOLMES: Good afternoon, Your Honor. Jennifer
10 Holmes from the NAACP Legal Defense Fund here on behalf of
11 the Amici organizations. I'm joined by our local counsel,
12 Kate Cook, and also my colleagues Michelle Turnage Young,
13 Rachel Kleinman, Cara McClellan, and Catherine Bullock.

14 THE COURT: Excellent. So each party has an hour.
15 The two Amici have 15 minutes. I'm happy to do this however
16 you would like.

17 MR. MORTARA: Your Honor, I'll be presenting in our
18 opening piece for Students for Fair Admissions. We have one
19 small request changing up from the last closing.

20 We would like, with Your Honor's permission, to
21 have the plaintiff's traditional opportunity to have the last
22 word. So if you wouldn't mind, we'd like our rebuttal piece
23 to go after the amicus parties.

24 THE COURT: I'm fine with that. Any objection from
25 Harvard?

1 MR. LEE: Not from Harvard, Your Honor.

2 THE COURT: How much time are you reserving,
3 Mr. Mortara?

4 MR. MORTARA: 15 minutes.

5 THE COURT: Karen, you got that? 45 minutes for
6 him and then he can have his last 15.

7 Wasn't sure you were going to make it back,
8 Mr. Mortara.

9 MR. MORTARA: Your Honor, I just couldn't quit this
10 case.

11 THE COURT: The people that are standing in back,
12 you're welcome to stand. But you have to have a wall because
13 you're blocking all those people that you're standing in
14 front of. Or a floor, you can have a floor, too.

15 When you're ready.

16 MR. MORTARA: You should have a binder, Your Honor,
17 that has all of my demonstratives that I'm going to show. I
18 know you like to follow along in paper.

19 THE COURT: Yes. I appreciate that. Thank you.

20 MR. MORTARA: I'll try to tell you the tabs that
21 are numbered. They're not all consecutive because they
22 correspond to some things I'm showing on the screen or in my
23 outline, but I'll direct you to the tabs as needed as we roll
24 through. There's also some duplicates, but that's because
25 I'm rolling through. So please don't be alarmed by

1 duplicates. Luckily nothing fell out this time.

2 With your permission, Your Honor, I'll begin.

3 THE COURT: Go.

4 MR. MORTARA: Your Honor, in preparing your opinion
5 in this case, the Court will have the opportunity to explain
6 the undisputed facts, decide the disputed facts, and of
7 course apply the law to both.

8 Perhaps the most important undisputed fact is that
9 Asian-Americans received dramatically statistically
10 significantly lower personal ratings from Harvard, lower than
11 whites, lower than African-Americans, and lower than Hispanic
12 applicants.

13 And perhaps the most important question in the case
14 is, why is that happening?

15 It's no exaggeration to say that entire communities
16 of Americans, millions of them, await this Court's important
17 answer to that question. And the case also turns on the
18 answer, as the Court knows.

19 If the Court finds that Harvard imposed a racial
20 penalty in the personal rating against Asian-Americans,
21 Harvard loses this case on Count I.

22 And Your Honor, as we did in the previous closing,
23 we're happy to rest on our papers on the other counts.
24 Should Your Honor have questions on those other counts,
25 Mr. Hughes is here to answer them, and we'll take up our time

1 to do so should we need to.

2 There's only two possible answers to that important
3 question, Your Honor. Either Asian-Americans actually
4 deserve those lower personal ratings because, in fact, they
5 have less integrity, kindness, grit, and likability and all
6 the things that Harvard says it's looking for; they actually
7 have inferior personal qualities. Or Harvard admissions
8 officers have fallen prey to human frailty and racial
9 stereotyping.

10 The Court can side with Harvard and write into law
11 that Asian-Americans are actually just one dimensional and
12 book smart. Those are Harvard's terms.

13 Or the Court can find that through some mechanism,
14 whether it was inadequate supervision, inadequate training,
15 or inadequate written guidance, racial stereotyping crept
16 into Harvard's process.

17 As Mr. Hughes said the last time we were here, the
18 statistical battle in this case boils down to whether or not
19 you find race influences the personal rating.

20 If it does, even as just a tip, Professor Card
21 admitted it should be removed from the admissions model.
22 Your Honor knows the testimony.

23 Please excuse me while I relaunch my computer.

24 Your Honor knows the testimony. He said it. It's
25 behind Tab 1 in your binder. It's inappropriate to include

1 any variables that can themselves be affected by race.

2 And behind Tab 2, he said it again. Even if the
3 rating is influenced by race only in the form of a tip.

4 Those are clear admissions.

5 THE COURT: Can I interrupt you for a second?
6 Don't I have to find it was intentional for Count I?

7 MR. MORTARA: Absolutely not, Your Honor. Unless
8 by "intentional" you mean animus.

9 THE COURT: That or intentionality. Or are you
10 relying on *Teamsters*?

11 MR. MORTARA: We are relying on pattern or
12 practice, absolutely. Obviously it's an intentional
13 discrimination case. You have to find intentional
14 discrimination.

15 The First Circuit has been very clear that
16 intentional discrimination doesn't mean animus. The Supreme
17 Court has been very clear about that in all of the equal
18 protection cases going back to the '90s that you do not need
19 to find animus to find intentional discrimination.
20 Intentional discrimination can come from racial stereotypes
21 or unthinking bias. That's what the First Circuit said in
22 *Thomas* against Eastman Kodak.

23 THE COURT: Go ahead.

24 MR. MORTARA: In Professor Card's own model, when
25 the personal rating was removed, again as Your Honor knows,

1 he himself found in Harvard's admissions model a
2 statistically significant Asian penalty.

3 And you would expect then, since Professor Card
4 testified that if race influences the personal rating and if
5 it comes out of his model, it should come out of his model.
6 And if it does come out of his model, he himself found an
7 Asian penalty, that he would have told you, given you an
8 opinion, that race was not affecting the personal rating at
9 all.

10 But he did not. He did not give you an expert
11 opinion as an economist crunching any numbers or present any
12 analysis that showed race wasn't influencing the personal
13 rating. He instead chose to take Harvard's word for it.

14 Dean Fitzsimmons had a telephone call with him and
15 said we have never used race in the personal ratings, and
16 Professor Card accepted that representation.

17 The only model of the personal rating came from
18 Professor Arcidiacono, which showed significant effects of
19 race. Negative on Asians, positive for African-Americans and
20 Hispanics. That's behind Tab 4 in your binder. You'll
21 remember this slide from Professor Arcidiacono, and in the
22 lower left pane of that slide you'll see the personal rating
23 model. Negative penalty for Asians. Large tips for
24 African-Americans and Hispanics.

25 Professor Card and Harvard, now through hundreds of

1 pages of posttrial briefing, have made no effort whatsoever
2 to explain the massive boost for African-Americans and
3 Hispanics found here and shown in the raw data.

4 Card never once talked about it, even though if
5 those tips are present, the personal rating will be just like
6 the overall rating and should be removed from the admissions
7 model, by his own testimony.

8 Harvard hasn't even tried to offer a rationale for
9 why African-Americans and Hispanics just have better personal
10 qualities than Asians or whites, why they would be more
11 likeable or have greater kindness, integrity, or grit.
12 Because they don't. Because your skin color doesn't
13 determine your personal qualities.

14 In answering Professor Arcidiacono's model, Harvard
15 focused exclusively on the first third, the Asian penalty
16 that Professor Arcidiacono found. But all the analysis
17 Professor Card did could not make it go away.

18 You'll remember, Your Honor, this demonstrative I
19 have created with Professor Card during the
20 cross-examination. This is behind Tab 5 in your binder. He
21 had shown the first four dots in his direct exam Professor
22 Arcidiacono's models of the personal rating, including model
23 5 which includes all the variables, the ratings variables,
24 context variables, interactions, demographics, academics.

25 And then he said, and I added some more variables

1 and I made the Asian penalty smaller. And if I kept adding
2 variables, it might just go to the ceiling.

3 When I got to talk to him, we put in his results
4 and showed that even throwing in all the variables he could
5 at the personal rating model, he could not make the Asian
6 penalty go away. Far from going to the ceiling, it's
7 plateauing at a statistically significant level. He said his
8 own analysis showed a statistically significant Asian
9 penalty. He didn't make it go away.

10 Harvard has some answers to this. First, Harvard
11 repeats like a mantra the idea that because Asians outperform
12 white and other applicants on the extracurricular and
13 academic ratings, that must mean that Professor Arcidiacono
14 found a positive racial bias in those ratings.

15 And behind Tab 6 you have again Professor
16 Arcidiacono's models of the ratings, and I'll just blow up on
17 the screen the academic rating. The point Harvard is making
18 here is because of this modest positive coefficient on
19 Asian-Americans, that must be mean that Professor Arcidiacono
20 should have been saying there's a positive bias in the
21 academic rating, as we have explained many many times.

22 There are observables in the data like SAT scores,
23 for example, important for the academic rating. There's also
24 data about the applicant that Harvard has that don't go into
25 the model either because we don't have enough of it or

1 because it's hard to program into the model.

2 One example of the former is the number of AP exams
3 a student may have taken. There's also evidence in the
4 record that Asian applicants take more AP exams than white
5 applicants to Harvard.

6 An example of the latter would be the type and
7 quality of academic awards that an applicant got. That's
8 hard to code into the data.

9 The directionality you see here is consistent with
10 the idea that Asian-Americans are superior to white
11 applicants on the observable data like SATs, GPAs, the like.
12 And they're also superior on the unobservables like number of
13 AP scores, number of AP tests, and academic awards.

14 It's when these arrows move in starkly opposite
15 directions that you know there's a problem like you see in
16 the lower left with the personal rating, arrows and the bars
17 moving in opposite directions.

18 Now, Harvard likes to use jargon like
19 omitted-variable bias or other unobservables as some sort of
20 mystical explanation for why Asians are getting penalized on
21 the personal score that isn't itself race.

22 I just gave you the example of the number of AP
23 scores and the academic awards. What are Harvard's omitted
24 variables that will tell us Asian applicants really have less
25 integrity, grit, kindness or likability? To even ask the

1 question proves that Harvard's invocation of terms like
2 omitted-variable bias and other unobservables just repackages
3 racial stereotypes and cloaks them in scientific sounding
4 phrases.

5 And to the surprise of no one, other than Harvard,
6 perhaps, the law is defendants cannot win discrimination
7 cases by saying it must be some other variable, without
8 telling us what that variable is, and providing evidence that
9 would support a race-neutral reason.

10 Harvard didn't do that. A case that says that,
11 Your Honor, is the *Palmer* case from the D.C. Circuit cited in
12 our briefs.

13 Where is the evidence that white applicants to
14 Harvard write essays that just make them seem more likeable
15 than Asian applicants? Harvard cannot even start to answer
16 that question without invoking still more casual racist
17 stereotypes, adding to the list of loaded terms like
18 "one-dimensional" and "book smart" that we heard during the
19 trial.

20 The law and common sense tells us that skin color
21 has nothing to do with your personal qualities or likability.

22 Harvard's second answer to this is that, even
23 though Professor Arcidiacono's model 5, shown here on the
24 screen, includes all the ratings variables, Harvard now says
25 that because whites do slightly better on school support

1 ratings, that answers everything.

2 But it answers absolutely nothing, Your Honor.
3 Harvard's admissions officers themselves assigned the school
4 support ratings. And there was unrebutted and undisputed
5 testimony from Professor Arcidiacono that he also found an
6 Asian penalty in those ratings.

7 Moreover, there was testimony, including from Dean
8 Fitzsimmons, that the personal rating is not only based on
9 school support or alumni interview ratings. Harvard admits
10 extracurriculars and how a student performs in them weigh
11 into the personal rating. And we know Asians massively
12 outperform white applicants on the extracurricular rating.

13 All Harvard did was cherry-pick one sliver of the
14 data, one spot where whites do slightly better, and then
15 tried to drive that through the entire explanation of the
16 observed Asian penalty. But without an actual statistical
17 model, it proves nothing. And the only regression analysis
18 we have is the one on the screen and the iterations Professor
19 Card did afterwards, all of which show a statistically
20 significant Asian penalty.

21 And as Professor Arcidiacono testified, and the
22 amicus brief at page 7 says, the relatively small white Asian
23 school support gap cannot explain the observed raw data
24 personal score gap that we see both in the raw data and in
25 the regression model.

1 And what about African-Americans and Hispanics?
2 Two-thirds of the pane you're looking at with these massive
3 boosts going in the opposite direction of the observables,
4 they do so much better on the personal rating than whites and
5 Asians.

6 Did Professor Card and Harvard show you how school
7 support or alumni interview ratings explained that? No, they
8 didn't because they're not explaining the racial distribution
9 of the personal rating at all. They're not giving you
10 evidence that race doesn't influence the personal rating.

11 Harvard wants you to believe that it's just a
12 coincidence that the racial pattern on the personal rating
13 looks just like the racial pattern on the overall rating,
14 which you'll see behind Tab 7.

15 Harvard wants you to think they admit using race in
16 the overall rating, admit giving a preference to
17 African-Americans and Hispanics in the overall rating.

18 There's undisputed testimony, unrebutted by
19 Harvard, unrebutted by Card, in this case that there's an
20 Asian penalty in the overall rating. And they want you to
21 look at the same distribution in the personal rating and
22 believe them that race has never been used and race does not
23 influence the personal rating.

24 One thing Harvard is very good at is something that
25 some people call, colloquially, don't believe your lying

1 eyes, but we can also learn about in George Orwell's 1984.
2 Two plus two equals five. Don't believe what you're seeing.
3 Don't believe what you're looking at, the same pattern
4 between overall and personal. Believe us, trust us. Race
5 has never been used in the personal rating.

6 And, Your Honor, that's before we get to all the
7 nonstatistical evidence on the personal rating where we see
8 more of this type of argument.

9 Some examples. Christopher Luby. We're supposed
10 to believe that Mr. Luby testified credibly at trial that he
11 never used race in the personal rating. That's Harvard's
12 word from their posttrial brief, "credibly," even though he
13 said the opposite under oath at his deposition in the first
14 hour. Then he sat there for hours answering additional
15 questions from my friend Mr. Connolly, didn't change his
16 testimony.

17 Then a month later he got the written transcript
18 and spent hours looking at that, reading what had been asked
19 and what he had answered, changing dozens of things,
20 substantive things about his testimony. Didn't change it
21 then.

22 But then we're supposed to believe, you and I, that
23 after 40 hours spent with Harvard's counsel, he suddenly
24 discovered the truth about how he'd been doing his job all
25 along and that he'd never used race in the personal rating

1 ever.

2 Two plus two equals five, Your Honor. Trust us.

3 We're supposed to believe that even though the
4 Department of Education's Office of Civil Rights found in a
5 report in 1990 that Harvard's admissions offices, at least
6 some of them, had been using race in the personal ratings, a
7 finding that has never once been disputed by Harvard in
8 hundreds of pages of posttrial briefings. They've never once
9 even answered it or addressed it.

10 And then everyone from Mr. Lee to Director McGrath
11 to Dean Fitzsimmons came to court and told us nothing had
12 changed about Harvard's use of race since that finding.

13 And as you know, and behind Tab 8 you will find
14 Plaintiff's Exhibit 509, Harvard's own lawyers are writing
15 letters to the Department of Education, telling them those
16 earlier findings are still accurate today as late as 2012.

17 And no one remembers ever training or admonishing
18 anyone about not using race in the personal rating, even
19 after DOE made those findings. Yet we are now supposed to
20 believe Harvard's made-for-litigation excuse that no one has
21 ever used race in the personal rating, despite the fact that
22 the United States Government found that they did. And then
23 they told that same government nothing had changed as late as
24 2012.

25 Two plus two equals five, Your Honor. Trust us.

1 It's never happened.

2 And what about what happened last summer? We're
3 supposed to believe that Director McGrath was in Montana and
4 she didn't read the deluge of national press about this case
5 created by the summary judgment filings and the revelations
6 about the personal rating that were all over the press.

7 Mr. Hughes is from Montana. His parents in
8 Whitefish had no trouble following the case.

9 We're supposed to believe that even though before
10 that summary judgment briefing the admissions office had
11 gotten together at a retreat and they decided to make no
12 changes to the personal rating guidance.

13 But somehow Harvard would have us believe that sua
14 sponte in August, after all that press, the admissions office
15 embarked on a process that ultimately added 872 percent more
16 words to the instructions on the personal rating than had
17 existed before.

18 That's depicted behind Tab 9, Your Honor. You see
19 the class of 2022 reading procedures, Defendant's 744,
20 compared to the class of 2023, Plaintiff's 633. This thing
21 had not changed in such a material way in decades.

22 Behind the next tab, Your Honor, 10, you'll see the
23 reading procedures guidance from the 1980s contained in the
24 OCR report compared to 2022 compared to what they did in
25 August. And of course that had nothing to do with this case,

1 nothing to do with the revelations in the press, nothing to
2 do with this upcoming trial. Nothing at all. That's what
3 Harvard wants you to believe. That's what they've said.

4 Now, we're told these massive revisions actually
5 changed nothing at all, and this is just a codification of
6 uniform historical practice that no one has ever deviated
7 from. Right. Because you don't change something for nearly
8 40 years in any appreciable way, and the system is working
9 perfectly, and no one uses race in the personal rating even
10 though the Department of Education found they did, but you
11 need to add 872.5 percent more words to make sure everything
12 stays the same. And you have to add the first ever
13 injunction against using race in the personal rating
14 appearing in writing ever.

15 And of course the key language added that we all
16 know is designed to fight caricature and stereotypes of
17 Asians.

18 Appearing behind Tab 11, of course, at the top,
19 you'll see the reading procedures and the language that
20 you'll well remember was in red in one of the drafts, Your
21 Honor, compared to the OCR report which found, amongst other
22 things, that Harvard admissions officers had used
23 stereotypical language about Asian applicants.

24 We need to talk a little bit about how this came to
25 light, Your Honor. First Director McGrath and Dean

1 Fitzsimmons testify inaccurately about whether there's
2 written guidance on the personal rating on race in this
3 court. That's what happened. The questions could not have
4 been clearer, and they got the answers dead wrong.

5 Remember my question. Down to a sticky note on the
6 coffee pot, I asked Director McGrath, is it written anywhere
7 at the admissions office not to use race in the personal
8 operating?

9 She said, no, it's not.

10 We found out later when Director McGrath came back
11 that she had imposed an un verbalized qualification on my
12 question to be limited to the discovery period.

13 But putting aside Director McGrath's confusion
14 about my question, after that, Harvard knew, Harvard's
15 lawyers knew inside and outside, Your Honor, they knew those
16 answers were inaccurate.

17 And they did nothing to correct that false factual
18 testimony even though every rule in the book says that when
19 your witness in your case says something that is not true and
20 you know it's not true, whether or not the witness made a
21 mistake, you have a duty to tell the Court and to tell the
22 other side, but they didn't.

23 Then when the last admissions officer was on the
24 stand in a throwaway rehabilitation attempt of Tia Ray, we
25 find out about the new reading procedures.

1 Caught now with the McGrath and Fitzsimmons'
2 inaccurate testimony and the Court's immediate order to
3 produce the reading procedures, Harvard first assures me and
4 assures you that these new reading procedures actually help
5 Harvard's case.

6 Two plus two equals five, Your Honor. Trust us.

7 These reading procedures, once we get them, end up
8 helping Harvard so much that by the time of closing Harvard
9 is telling the Court they're not admissible to support a
10 liability finding under Federal Rule of Evidence 407,
11 Subsequent Remedial Measures.

12 Just like I told you at my closing, Your Honor,
13 that argument has disappeared from the posttrial briefing
14 because it was waived when Harvard allowed the reading
15 procedures into evidence without objection.

16 I know you know this, Your Honor, but Rule 407 does
17 not exist because subsequent remedial measures are not
18 probative of liability. They're extremely probative of
19 liability. Rule 407 exists because of the public policy
20 matter. We want cities to fill potholes after there are
21 accidents without fear that the filling of them will be used
22 in a very effective way to acknowledge they should have been
23 filled in the first place.

24 We want universities to fix broken admissions that
25 are broken down because of racial stereotyping and add new

1 instructions to people that read those applications without
2 fear that those new reading procedures won't be marched into
3 court to prove, because they do, that they knew there was a
4 problem.

5 But because of our hands were trapped in the cookie
6 jar over the earlier erroneous testimony, Harvard waived
7 Rule 407, and now we can see just about the most powerful
8 evidence you can imagine of a recognition of a problem by at
9 least some of Harvard's own rank and file admissions
10 personnel after everything came out in public over the
11 summer. And a fundamental rewrite of the reading procedures
12 on the personal rating ensued.

13 But this is no big deal, Your Honor. 872 percent
14 more words, first ever injunction about race in the personal
15 rating, had hardly changed for decades, but we were supposed
16 to believe it just codifies uniform existing practice, Your
17 Honor.

18 Trust us. Two plus two equals five.

19 There's also a little bit of legal two plus two
20 equals five going on, Your Honor, and you alluded to it
21 earlier in your question. Harvard wants to tell you that we
22 have to prove evil racist intent in the hearts and minds of
23 admissions personnel in order to make out a case of
24 intentional discrimination.

25 I want to dispel that right here and right now with

1 binding First Circuit precedent behind Tab 12. It's the
2 *Thomas vs Eastman Kodak* case from Judge Lynch. The ultimate
3 question is whether the employee has been treated disparately
4 because of race.

5 This is so regardless of whether the employer
6 consciously intended to base the evaluations on race or
7 simply did so because of unthinking stereotypes or bias. And
8 it goes on.

9 And what does this mean? It means when Harvard's
10 admissions personnel come in here and tell you from the heart
11 that they're not discriminating while at the same time none
12 of them can explain why Asians are getting dramatically lower
13 personal ratings than whites, they may quite well have fallen
14 prey to racial stereotyping. And it doesn't make them evil.
15 It makes them human.

16 What else does it mean, Your Honor? It means if
17 you find in our favor on Count I, you do not need to find,
18 behind Tab 13, that the admissions officers came here and
19 lied and perjured themselves. That is a straw man. You
20 don't need to do that. We don't have to look into the hearts
21 of these admissions officers to see exactly why they
22 systematically gave Asians lower personal ratings,
23 undisputedly penalized Asians on the overall rating, no
24 rebuttal from Card. And undisputedly penalized Asians on the
25 school support ratings. Again, no rebuttal.

1 The models produced by both experts tell us it's
2 happening, and that's sufficient to make out our prima facie
3 case of intentional discrimination by itself under the
4 pattern or practice method.

5 Behind Tab 14 is again Professor Card's own model
6 with the personal rating out and the statistically
7 significant Asian penalty. Recall this model includes all
8 the things Harvard wants included except the personal rating.
9 ALDCs, intended careers, parental occupations, everything
10 that Professor Card wanted except that racially influenced
11 personal rating.

12 Under the pattern or practice method, we need to
13 show no more than this, this gross disparity to make out our
14 case.

15 Now, Your Honor, Harvard does like to make a little
16 bit of this gross disparity language that appears throughout
17 the cases, but the cases also make clear that it's synonymous
18 with the little asterisk at the bottom of the screen, a
19 statistical significance. *Hazelwood* at Footnote 14 talks
20 about the difference being two or three standard deviations.
21 Two standard deviations means a p-value of less than 0.05,
22 which is what we call a statistical significance, and it is
23 right there in the asterisk.

24 The First Circuit said as much in *Jones against*
25 *City of Boston*, at Footnote 9. That's a disparate impact

1 case. The D.C. Circuit has said it multiple times, including
2 in *Segar* and *Palmer against Schultz*, cited in our briefs.

3 We, of course, had our own statistical analyses.
4 It wasn't just Harvard's that showed an Asian penalty.
5 Professor Arcidiacono's analysis showed an Asian penalty.
6 And you recall the robustness checks that he had on that
7 analysis. And this one little change to Professor Card's,
8 removal, as he testified you should, of a rating that is
9 influenced by race gives what all the courts call *prima facie*
10 evidence of intentional discrimination, statistically
11 significant penalty.

12 Going to the law, Harvard now has two options.
13 They can dispute the analysis or provide a race-neutral
14 explanation. But it's hard for Harvard to dispute the
15 analysis and model of their own expert coupled with the
16 single finding that race influenced the personal rating.
17 They can only try to convince you, no, no, no, ignore what's
18 going on with the African-Americans and Hispanics, look only
19 at the school support ratings, or whatever other excuse they
20 have. Race isn't influencing the personal rating. Put aside
21 what the United States Government said in the OCR report.

22 And Harvard has yet to come up with any
23 race-neutral explanation for the Asian penalty in the
24 personal rating. I'll ask again for Harvard to be explicit.
25 Tell the whole world that Asian applicants to Harvard

1 actually deserved statistically significantly lower ratings
2 than whites, African-Americans, and Hispanics. Say they
3 deserved it.

4 But you know what, Your Honor, that will just be
5 lawyer argument, even if they're willing to say it, because
6 no Harvard admissions officer was willing to come in here and
7 testify as to why this is happening.

8 In fact, the idea that Asians deserve lower
9 personal ratings will be news to every Harvard admissions
10 officer that testified, from Director McGrath to Charlene
11 Kim. They universally said they wouldn't expect Asians to
12 have worse personal qualities.

13 Your Honor, there is some discussion about the
14 pattern or practice method and some discussion of waiver,
15 some confusion about this. And Harvard seemed surprised to
16 see reference to this method of proof in our brief.

17 But behind Tab 15 you will find Harvard's summary
18 judgment brief, docket 418. And over on page 36, which is
19 also behind that tab, Your Honor, at the top you'll see
20 Harvard knew exactly what was going on here.

21 Harvard told you that lacking direct support for an
22 intentional discrimination claim -- of course almost all
23 discrimination claims are circumstantial. Rarely do you find
24 the smoking gun letter saying what we're really trying to do
25 is limit the number of non-ALDC Asians on campus.

1 SFFA can make a prima facie case based on
2 statistics only if it can show gross disparities of the kind
3 and degree sufficient to give rise to an inference that the
4 nonuniform individualized analyses reflects a pattern or
5 practice of discrimination.

6 Citing what? A Third Circuit Title VII case on
7 pattern or practice. Citing what else? The *Hazelwood* case.
8 What's that? A Title VII case on pattern and practice.

9 This is Harvard's summary judgment brief. This is
10 no surprise to them. We had told you, Your Honor, and them
11 in discovery motions way before that, including back in April
12 of 2017. Behind Tab 18 you'll find one of our briefs, a
13 reply brief on a discovery dispute, where we said SFFA
14 alleges that Harvard engaged in a pattern or practice of
15 discrimination under Title VI. Citing what? The *Teamsters*
16 case, first case where the Supreme Court held private
17 plaintiffs could bring a pattern or practice method of proof
18 claim.

19 And then also *Indiana Harbor Belt Railroad*, which
20 is the Northern District of Indiana case, that holds that an
21 association like SFFA, like a union, can bring pattern or
22 practice method of proof to bear.

23 We did, Your Honor, refer to the *Arlington Heights*
24 framework and move on that basis an alternative legal theory
25 in our summary judgment motions. It's true. But one does

1 not have to move on all the bases for relief in a summary
2 judgment motion.

3 And moreover, we did not have the cross-examination
4 of Professor Card wherein he admitted that in all of his
5 admissions models, including the very last one he did, if you
6 pulled out the personal rating you got a statistically
7 significant Asian penalty.

8 We didn't waive pattern or practice method.

9 But Harvard has still more arguments. They're now
10 telling you the pattern or practice method of proof is either
11 not available in associational standing cases like this one
12 or not available under Title VI. The problem with both those
13 arguments is there is actually zero authority for either of
14 them.

15 We cited the only case to address the question of
16 associational standing cases, *Indiana Harbor Belt Railroad*;
17 that's the Northern District of Indiana case. No case holds
18 to the contrary.

19 And there's not a lot of case law on this, for
20 obvious reasons, Your Honor. The very premise of an
21 associational standing case, as you've observed several times
22 in orders in this case, is that we are not bringing claims
23 one by one on behalf of individuals. We're not deploying the
24 individual method of proof or the *McDonnell Douglas*
25 framework. We're not doing that. We're alleging systematic

1 discrimination.

2 The courts have held that individual plaintiffs
3 bringing a *McDonnell Douglas*-type claim cannot also resort to
4 the pattern or practice method. That is true. Those were
5 not the types of claims we were bringing.

6 And Harvard tried to tell you, in its opposition
7 brief at page 9, that the Second Circuit had held that
8 associations could not use pattern or practice proof in the
9 *Chin* case, which is behind Tab 20.

10 And it takes only a few minutes to look at the *Chin*
11 case to realize that that is a mischaracterization. Over at
12 the very first paragraph, which is also in your binder, Your
13 Honor -- I'll just put it on the screen -- you will see, and
14 then in the pages that follow, the only claims that were
15 tried in that case were claims by 11 Asian-American
16 individuals.

17 There had been an association as part of the case
18 earlier, Your Honor. They got the right to sue letter from
19 the EEOC. But no associational standing claims were tried in
20 that case, none at all. It was all individual evidence, Your
21 Honor.

22 Of course the Second held, as all circuits had,
23 that individual plaintiffs cannot bring pattern or practice
24 method cases. That's not what we're doing. This is an
25 associational standing case.

1 Your Honor, Harvard also says that you can't bring
2 pattern or practice under Title VI. Precisely zero authority
3 supports that.

4 And behind Tab 22 -- this only came up in Harvard's
5 reply brief, Your Honor, you'll find some supplemental
6 authority, which is the Title VI legal manual from the United
7 States Department of Justice, which on the very first page
8 tells you in the table of contents that, yes, you can use the
9 pattern or practice method in a Title VI case.

10 And it goes on on pages 22 and 23, which you can
11 also find in there, to discuss the legal bases for that,
12 citing all sorts of Title VII cases.

13 And on page 23, Your Honor, you will find
14 supplemental authority, the *Melendres* versus the infamous
15 Sheriff Joe Arpaio case from the Ninth Circuit, which is a
16 Title VI case deploying the pattern or practice method of
17 proof.

18 And, Your Honor, lest you think this is newly
19 minted Justice Department guidance on Title VI, we actually
20 made some effort to try to track back how long the Justice
21 Department has been telling everyone that they think you can
22 bring pattern or practice claims and prove intentional
23 discrimination under Title VI. It goes back at least as far,
24 potentially began at the time when Mr. Waxman was Solicitor
25 General of the United States in the Justice Department in the

1 Clinton administration.

2 We can bring a pattern or practice method. And
3 that means statistics alone, contrary to what Harvard says,
4 can prove our case. A regression analysis is what every
5 pattern or practice method says is sufficient to show
6 intentional discrimination, to get that statistical
7 significance mark.

8 But even if that weren't true, Your Honor, even if
9 we're under *Arlington Heights*, there's a mountain of
10 circumstantial evidence. I've already touched on the Office
11 of Civil Rights findings that Harvard used stereotypes and
12 was using race in the personal rating. The ultimate finding
13 there wasn't discrimination, but it didn't take long for it
14 to mature into a statistically significant Asian penalty.

15 I touched on Mr. Luby's frankly not at all credible
16 trial testimony and I talked about the new reading
17 procedures, such dynamite evidence of liability that
18 Rule 407, had Harvard been timely about it, would have kept
19 it out.

20 And, of course, there's the issue of Sparse
21 Country, Your Honor, and Dean Fitzsimmons's revealing and
22 frankly saddening testimony justifying why Asian students
23 living in New Orleans and Salt Lake City needed to get higher
24 PSAT scores to get a letter inviting them to Harvard.

25 Harvard points out in their brief it's not illegal

1 to discriminate on the basis of race in terms of who you
2 invite to apply. We agree, that is not illegal. What it is
3 probative of is Harvard didn't want any more Asians to apply.

4 What is more important is the direct evidence
5 behind Tab 25 that was right here in court when Dean
6 Fitzsimmons, in struggling to explain why this was going on,
7 over 20 pages of transcript finally says, well, there's some
8 people who might have only recently arrived in Sparse Country
9 and other people have been there forever.

10 We all know what was meant by that. It's what
11 Dr. Chin called the stereotype of Asians as the perpetual
12 foreigner. Mr. Hughes talked about it in his closing.

13 And what about what Dean Fitzsimmons did not do in
14 response to the findings of the Office of Institutional
15 Research? Here we have perhaps the worst instances of two
16 plus two equals five in the case.

17 Harvard, its witnesses, and its lawyers have stood
18 here and told you the following incoherent concepts. On the
19 one hand, everyone in admissions, including all the recent
20 college graduates they have, Miss Tia Ray, and Chris Luby,
21 they're perfectly trained on how to use race, even though
22 many of them couldn't remember that they'd ever been trained
23 on it. Essentially, they don't get any written guidance,
24 they never make mistakes ever or succumb to racial
25 stereotyping in assigning the personal rating. And, Your

1 Honor, to quote The Lego Movie, the first one, everything is
2 awesome.

3 But to use another literary reference, over at the
4 Office of Institutional Research, the Ph.D.'s who crunch
5 numbers for Harvard to submit to the United States
6 Government, they are the gang that couldn't shoot straight
7 because their work is so poor no one should believe it.

8 But in order to know they're the gang that couldn't
9 shoot straight, you have to first understand what they're
10 telling you. And there we're treated to potentially the most
11 extreme two plus two equals five moment of the case, and
12 that's Plaintiff's Exhibit 26, Your Honor, behind Tab 26 in
13 your binder, the May 1 memo from OIR. Not just Mark Hansen,
14 the junior staffer off on a lark --

15 THE COURT: I don't have Tab 26.

16 MR. MORTARA: It might be Tab 27, Your Honor.

17 THE COURT: No. 27 is something different.

18 MR. MORTARA: It might be Tab 28. It might not be
19 there.

20 THE COURT: It's not there.

21 MR. MORTARA: As is usual, Your Honor. Technical
22 details.

23 You know the document very well, Your Honor. And
24 as you see, a memo from all of OIR, not just Mark Hansen, but
25 Dr. Driver-Linn herself at the head, and you know what it

1 told Dean Fitzsimmons: They did a regression model, and he
2 looked at it.

3 Dean Fitzsimmons used to teach statistics. He
4 loved talking about statistics, and he's conversant in modern
5 statistical methods like regression analyses.

6 And here's the table. What did we see in the
7 table? What did it tell Dean Fitzsimmons? If you have an
8 athletic rating of 1, you're a recruited athlete. Harvard
9 wants you there. You get a big tip. I know that. We intend
10 to recruit athletes. We intend to give legacies a big tip.
11 It's a big part of this case. We've heard a lot about it.
12 We intend to give African-Americans a big tip. We intend to
13 give Hispanics a big tip. We intend to give low-income
14 applicants a tip.

15 And this is empirical proof of that, said Dean
16 Fitzsimmons. And then he got to the Asian penalty, minus
17 .37, p-value zero. He says, I don't know what that means.

18 That's what we're being told, that he got to the
19 bottom, intent to help athletes, intent to help legacies,
20 intent to help African-Americans, intent to help Hispanics,
21 intent to help low-income folks, proves empirical proof.
22 What's that? I don't know what that means. Even though OIR
23 told him what it meant. There are demographic groups that
24 have negative effects.

25 Your Honor, he understood what this meant. There's

1 some dispute about the law here about cases like *Personal*
2 *Administrator Against Phoebe*, the idea that you can proceed
3 in the face of a known disparate impact and that doesn't mean
4 you're discriminating on the basis of race.

5 Your Honor will recall that involved a preference
6 for veterans, which obviously falls unequally, at least at
7 the time, less so now, between men and women. We could still
8 have that preference. That's not discriminatory intent.
9 Absolutely true, Your Honor.

10 But that's not what this memo shows. A regression
11 analysis of this type in every single pattern or practice
12 method case is considered proof not of a disparate impact but
13 of intentional discrimination.

14 And that's what Professor Fitzsimmons, former
15 teacher of statistics, got in a memo. Not a memo saying
16 we've got disparate outcomes. A memo saying we have an Asian
17 penalty, intentional discrimination, the same as if an owner
18 of a business got a memo from a manager, saying I think we're
19 invidiously discriminating against African-Americans, boss,
20 what do you think?

21 What did Dean Fitzsimmons think? Not enough to
22 tell anybody about it or do anything else.

23 Your Honor, Harvard has its own accusations, to be
24 fair, of inconsistency on our part. Even though Professor
25 Card found that Asian penalty in the personal rating once he

1 removed -- Asian penalty in the admission outcome once he
2 removed the personal rating, Harvard points out that Students
3 for Fair Admissions went one step further and proved that
4 that Asian admissions penalty is only affecting the
5 98 percent of Asian applicants that aren't ALDCs. Your Honor
6 will recall that Professor Card's model includes all the
7 ALDCs, so that's kind of not an issue.

8 But we went a step further and said, no, this is
9 really falling heavily on the 98 percent of applicants that
10 are not in those preferred groups. Harvard calls it
11 incoherent that the 2 percent of Asian applicants who are
12 ALDCs are not treated on admissions outcomes statistically
13 significantly different from whites.

14 That should be behind Tab 28, Your Honor. And you
15 can see the admissions rates, they're slightly higher for
16 Asian-Americans. And Dr. Card actually said if you add back
17 in the athletes and peel apart the ALDCs, Professor
18 Arcidiacono's model shows there may even be a tip for Asian
19 legacies over white legacies.

20 But the absence of an Asian penalty for ALDCs or
21 even a preference for them is not inconsistent with a penalty
22 in the 98 percent of Asian applicants who don't fall into
23 those special categories.

24 It's not incoherent. It's, in fact, so coherent
25 legally there's an entire body of case law, typically in sex

1 discrimination, directed to this concept, saying plaintiffs
2 can prove illegal discrimination against a subgroup.

3 And it's not so coherent factually. Your Honor,
4 it's happened before. The law of the so-called sex-plus or
5 race-plus cases is absolutely clear. You can't defend a
6 discrimination charge by pointing to another subgroup of the
7 protected class you didn't discriminate against.

8 Imagine a scenario where 98 percent of the women
9 who apply to a job have children and 2 percent don't. The
10 employer discriminates against the 98 percent of the women
11 with children, for whatever reason, and does not discriminate
12 against the 2 percent that do not have children or maybe even
13 gives them a preference.

14 Why would they do that? There could be many
15 different and equally awful reasons. Maybe they think women
16 without children are more likely to participate in company
17 social activities, they'll fit in better, be more patriotic
18 towards the company. Maybe they prefer having women in the
19 workplace who they perceive don't always talk about their
20 children.

21 Maybe they even prefer the 2 percent childless
22 women and hire as many as they can so that they can justify
23 to the EEOC or someone else who comes along and makes charges
24 of sex discrimination based on the raw numbers. They want to
25 be able to say we don't discriminate; look at all these women

1 we hire. Maybe when they get sued, they will say your sex
2 discrimination theory is incoherent. We hired all these
3 childless women; we even gave them a preference.

4 Too bad for them and for Harvard. The law is
5 crystal clear that this is unlawful discrimination, and
6 incoherency is not an excuse. That's exactly what happened
7 here. Just like an employee in my hypothetical, Harvard
8 imposes no admission penalty on Asian ALDCs but does impose
9 the penalty on those it deems less desirable, the non-ALDC
10 Asians.

11 This makes perfect sense. This would be an easy
12 case if Harvard hadn't ever let in any Asian-American
13 applicant. We would have won this on a Rule 12 summary
14 judgment. It would be an easy case if they let in zero of
15 that 98 percent of Asian non-ALDCs.

16 Harvard is always going to admit some
17 Asian-American applicants. We all know that. And the fact
18 that in their virtual draft they prioritize the wealthy and
19 connected may be somewhat embarrassing to Harvard, but after
20 the evidence at trial, it's hardly surprising. It makes
21 perfect sense.

22 Asian ALDCs are certainly less likely to be the
23 perpetual foreigner that Dean Fitzsimmons was alluding to.
24 They're the children of Harvard alumni, after all. They have
25 something more, the Harvard DNA that Harvard likes so much.

1 It makes perfect sense. Asian alumni of Harvard are
2 Harvard's donor and support base. Why risk angering them and
3 losing those donations and support?

4 Makes perfect sense, Your Honor. It's happened
5 before. And I know you've expressed reticence, to put it
6 mildly, to invoke history here. But I can point out that
7 several institutions of higher education in the last century
8 had the very same unlawful discriminatory policy that Harvard
9 today calls incoherent. They had discriminated against Jews
10 who were not legacies while treating legacy Jewish applicants
11 more fairly. They even enlisted the support of prominent
12 Jewish alumni to justify their schemes to keep the numbers of
13 undesirable Jewish students down.

14 And why did they do this? Because of stereotypes
15 about those Jewish students, as among other things recent
16 emigrants or perpetual foreigners. It's right in Jerome
17 Karabel's book at page 98.

18 You're right, Your Honor. It's not terribly
19 relevant in the identity sense which institutions ran this
20 perfectly coherent if morally repugnant, sick system of
21 discrimination. It's not terribly relevant that they
22 included Williams, Dartmouth, and Harvard.

23 But the history does tell us it's perfectly
24 coherent to prefer a subgroup of the unpreferred group to
25 cover one's tracks by allowing more of the desirable Asian or

1 Jewish applicant and less of the undesirables and to provide
2 a fig leaf of a justification to enroll the support of alumni
3 members of that unpreferred group.

4 It happened before, and it's happening again. It's
5 about as far, sadly, from incoherent as one could imagine.

6 But Harvard tells you it's incoherent to accuse
7 someone that it and others have done before. What scofflaw
8 employers of in violation of Title VII have done typically in
9 the sex discrimination context and which sadly and perversely
10 makes sense.

11 Two plus two equals five again.

12 Your Honor, I've reached the end of my initial time
13 with you. I'm going to come back again and tell you that
14 Asian applicants didn't deserve lower personal ratings. Will
15 Harvard explain to all of us why they did, or will they hide
16 behind omitted-variable bias and unidentified unobservables
17 without telling us on what omitted unobservable variable
18 Asians do so much worse than not just white applicants but
19 African-American and Hispanic applicants, too?

20 The school support ratings, they're in the model.
21 All the ratings are in the model. Every variable Card could
22 find could not make the racial penalty on Asians go away.
23 Harvard never once has tried to explain what's going on in
24 the personal rating with African-Americans and Hispanics. We
25 know what's going on. It's a preference just like there's a

1 penalty for Asians.

2 The Court, however, does not have the luxury of
3 silence. For it to rule in favor of Harvard on Count I, it
4 must explain why Asians deserved lower personal ratings.

5 It's now Harvard's turn, finally, here at the end
6 of all things, to tell us why.

7 THE COURT: I have three questions for you. I want
8 you to answer all three of them in less than two minutes.

9 MR. MORTARA: I can do it.

10 THE COURT: I'm going to give you all three of them
11 so you can allocate your time.

12 To find for you, which is largely a statistical
13 argument you're making, must I find Harvard's witnesses not
14 credible?

15 MR. MORTARA: No.

16 THE COURT: That's number one.

17 Number two, what am I to do with the fact that you
18 haven't shown me any students that you think should have
19 gotten in instead of the non-Asian students that did get in?

20 And number three, what are we doing with *Goodman*
21 and its requirement --

22 MR. MORTARA: I am ready. I have *Goodman* to put up
23 on the screen. I'll take the last one first, Your Honor.

24 The language you talked about from *Goodman* is up on
25 the screen now, Your Honor. It is very clear from the

1 context that racial animus is here being used just as
2 interchangeably with intentional discrimination.

3 But I don't even need to get there. The Supreme
4 Court held in *Gratz*, they found a Title VI violation in *Gratz*
5 by the University of Michigan when there was absolutely no
6 animus whatsoever. That's a Supreme Court decision.

7 Decisions both before and after *Goodman*, including
8 *Croson* and *Adarand* say in the equal protection context, your
9 motives don't matter. You don't have to have animus to make
10 out an equal protection violation.

11 As you know, the Supreme Court's incorporated those
12 equal protection concepts into Title VI, and that includes
13 cases that postdate *Goodman*, like *Cooper*, cited in our brief.
14 No court has ever said that Title VI bizarrely sits out in
15 the family of Section 1981, 1983, Title VII, Title IX, and
16 the equal protection as the one anti-discrimination law we
17 have in this country where you have to prove evil racist
18 intent.

19 *Goodman* certainly does not say that. If it did say
20 that, Your Honor, it's been overruled by subsequent Supreme
21 Court precedent. *Gratz*, no one said -- no one said the
22 University of Michigan had invidious intent. And there was a
23 Title VI violation found in that case.

24 Your Honor's first question was do you need to find
25 Harvard's witnesses were not credible or lied?

1 Absolutely not, Your Honor. Obviously we believe
2 Mr. Luby wasn't credible on the use of race in the personal
3 rating. But I understood your question to be more general.
4 Absolutely not. *Thomas* against Eastman Kodak said that.

5 There was a premise in your first question saying
6 our evidence was largely statistical. I have to quibble a
7 little bit with you there. I really like those new reading
8 procedures, OIR, and I know there's pieces of evidence I
9 didn't talk about that Your Honor has indicated are not
10 terribly persuasive to you. But we are not running away from
11 them. There are some emails and some jokes, including some
12 jokes you didn't let us put into evidence, that I think
13 support our case.

14 The second question is escaping me.

15 THE COURT: You haven't showed me any students --

16 MR. MORTARA: Sorry, Your Honor. Because you told
17 us we didn't have to. The answer to that one is you told us
18 that we didn't need to bring individual students in here and
19 prove their claims.

20 The *Segar* case from the D.C. Circuit is really
21 great on this. It's true that circumstantial evidence can
22 give life and meaning, to breathe life into the statistics.
23 That's true. But there is absolutely no requirement to bring
24 it.

25 We also gave you some anecdotal evidence. We

1 showed you that ice skater. Remember the ice skater with the
2 low personal rating and everything else was out of sight
3 about that Asian applicant, yet that person did not get in.

4 We don't need to do it. Segar says we don't need
5 to do it. The very premise of associational standing cases
6 is we don't need to do it.

7 Thank you, Your Honor.

8 MR. LEE: May I proceed, Your Honor?

9 THE COURT: You may.

10 MR. LEE: Good afternoon. As we did in our closing
11 argument after trial, Mr. Waxman and I are going to split the
12 closing for the next hour. After I offer an introduction,
13 Mr. Waxman will address the intentional discrimination claim
14 and the claim that Harvard does not use race as more than a
15 plus factor.

16 I will then address the claim of racial balancing
17 and the race-neutral alternatives. Although SFFA hasn't
18 addressed those claims, they are important claims and they
19 were tried and litigated and we think they should be
20 addressed.

21 Let me begin again by thanking the Court and the
22 courtroom staff for the time and careful attention you've
23 given to this case. As the Court noted at the very end of
24 the trial, the issues raised in this case are incredibly
25 important, not only for the parties but also for the future

1 of higher education. And of course those issues are
2 critically important to Harvard's health.

3 And here with us in the courtroom today are the new
4 president of Harvard, Larry Bacow, Dean Fitzsimmons who you
5 know, and Director McGrath who you know.

6 We have trials for a reason, Your Honor, as you
7 know. And it's not a coincidence that Harvard asked for a
8 trial in this case. We have trials because cases should be
9 decided on the facts and evidence elicited under oath, not by
10 unsupported accusation and vitriol directed at lawyers or
11 individuals. We have trials because of facts and the truth
12 matter.

13 Thirteen current and former Harvard employees and
14 administrators appeared in this courtroom and subjected
15 themselves to the crucible of cross-examination. At the end,
16 we submit they left a singular and indelible impression.
17 They are good and dedicated people faced with the
18 exceptionally difficult task of selecting from an
19 extraordinary group of applicants in admitting a class of
20 students who are individually excellent and who collectively
21 form a diverse and robust community.

22 They make those decisions, as Your Honor knows, as
23 a result of a long process involving many checks and
24 balances, and ultimately as a group of 40 after reviewing the
25 entire applicant's file and understanding the applicant

1 entirely.

2 The record of the trial that I was at is thousands
3 of pages and hundreds of exhibits. But that collective
4 record demonstrates, we submit, that Harvard does not
5 discriminate against Asian-Americans or any other racial or
6 ethnic group; that Harvard does not consider race as more
7 than one among many factors in evaluating an applicant; that
8 Harvard does not and has not engaged in racial balancing; and
9 that it could not achieve its educational mission without
10 considering race as one of many factors in admissions
11 process.

12 Now, before we go into the claims in detail, I
13 would like to take a moment to discuss what is missing from
14 the record and answer Your Honor's third question to SFFA.

15 It is really remarkable. The cases we have talked
16 to Your Honor about *Bakke*, *Grutter*, *Grace*, *Fisher*, *Fisher 1*,
17 *Fisher 2*. They have those names because there was a
18 plaintiff. There was an individual. There was someone who
19 claimed to be discriminated against.

20 What you have is really remarkable. No member of
21 SFFA testified. Not a single one of its standing members
22 testified. Not a single Asian-American applicant to Harvard
23 who was denied admission testified. Not a single application
24 of any one of their standing members went into evidence.

25 And with the truly unexceptional -- truly

1 insignificant exception, and I'll explain why in a second, of
2 one file that its expert discussed, the plaintiff presented
3 nothing. And when their expert presented that one file that
4 SFFA just referred Your Honor to, the expert conceded on
5 cross-examine that it did not prove discrimination.

6 Even after Your Honor in the middle of trial raised
7 the issue and invited the plaintiff to reconsider the absence
8 of any individuals who have been discriminated against, it
9 offered nothing. In a case alleging widespread intentional
10 discrimination across multiple years, 160,000 applicants, the
11 plaintiff's failure to produce a single individual claiming
12 to have suffered as a result of that discrimination or a
13 single file reflecting a discriminatory outcome is truly
14 remarkable.

15 Now, there were fact witnesses who did testify, and
16 they showed just how and why Harvard's admissions system
17 works and why it complies with the law. Just like the
18 testimony of the trial witnesses in *Grutter* described in the
19 *Grutter* opinion, those witnesses confirmed that Harvard
20 considers an applicant's race along with all other factors;
21 that Harvard does not seek to admit any particular number or
22 percentage of underrepresented minorities; and that the
23 extent to which race is considered in admissions, to quote
24 from the case, varies from one applicant to another.

25 Now, as a result of the absence of this proof, the

1 absence of any real-world proof that would bring to life
2 their allegations and accusations, their claim has become a
3 constantly moving target, which is why SFFA at the end of
4 their closing just now spent so much time trying to justify
5 their change in positions.

6 Let me give you two examples. In opening
7 statement, the plaintiff claimed at the outset that Harvard,
8 Harvard's admissions office, bore intentional discriminatory
9 animus against some Asian-American applicants.

10 By closing, having failed to address any evidence
11 of animus, it retreated to the claim of, and I quote,
12 implicit or unconscious bias, and suggested it had crept into
13 the system.

14 Now, in the posttrial briefing and in the closing
15 today, recognizing that there was no proof of unconscious
16 bias from an expert or otherwise, the plaintiff argues that
17 because people in the United States stereotype
18 Asian-Americans, Harvard has a burden to show that it has
19 uniquely escaped the infiltration of that bias.

20 That's not the law, and Mr. Waxman will address it
21 specifically.

22 THE COURT: Can I interrupt you? You can put this
23 off to Mr. Waxman, if you want, later.

24 MR. WAXMAN: Thank you, Your Honor.

25 MR. LEE: It depends how difficult it is, Your

1 Honor.

2 THE COURT: If one were to believe that there was
3 implicit bias or unconscious bias of some sort or another, is
4 there no remedy for that?

5 MR. LEE: Your Honor, I don't think -- I have two
6 parts to that, and I think Mr. Waxman will address it
7 specifically. Let me give you my answer and maybe his will
8 be better.

9 The first thing is on this record there's just no
10 proof. And the concept of -- and I think Your Honor got this
11 even as it started to creep into the trial, precisely what
12 implicit or unconscious bias is.

13 It's not some easily defined concept. The question
14 of whether things that might fall within someone's rubric of
15 unconscious or implicit bias might, might satisfy the intent
16 requirement is something that I don't think Your Honor needs
17 to decide. It's something that can't be decided on this
18 record. And the whole concept doesn't have sufficient
19 specificity to decide it in the abstract.

20 I think the important part here is to go to Your
21 Honor's first question to Mr. Mortara. They do have to
22 proffer intentional discrimination. That's the claim. The
23 fact that the claim has evolved to where it is today says a
24 lot about the evidence at trial.

25 And it's not just, Your Honor, the claim that's

1 evolved. It's the specifics of the claim. Your Honor will
2 recall in opening, if I go to Slide 4 of our presentation,
3 the very first thing that SFFA said to the Court, to the
4 public, was that it was not alleging that Harvard
5 discriminates against Asian-American ALDC applicants. Those
6 literally were the first words of the trial.

7 Why? Because as we found out on cross-examination
8 of their expert, he was not claiming that Harvard
9 discriminates against Asian-Americans. And I took him
10 through each category specifically. It's on Slide 5. He
11 agreed that Asian-Americans in those categories, if I move to
12 Slide 6, were actually admitted at higher rates than those --
13 than identical white applicants. For legacy applicants, he
14 conceded on cross-examination the difference was
15 statistically significant.

16 It is very difficult to square that testimony or
17 that accusation of discrimination against some but not all
18 with an intentional discrimination case.

19 It's even harder, to go to Your Honor's question,
20 to square that with an unconscious bias or an implicit bias
21 case. How does that work? The plaintiff knows that, which
22 is why you heard what you heard in this closing. What they
23 did is they have changed their theory 180 degrees. They now
24 have claimed in their final filings that, oh, wait, actually
25 Harvard does discriminate against ALDCs, but they have a

1 problem.

2 First, it's just a 180-degree change in position.
3 The second is, if I take you to Slide 8, Professor
4 Arcidiacono testified that even taking into account any tip
5 given for being an ALDC applicant, Asian-Americans in these
6 categories are admitted at higher rates than white
7 applicants. It is a concession that is inconsistent with the
8 intentional discrimination claim.

9 So, Your Honor, if I could, just on Slide 9s, let's
10 just compare what SFFA said when the trial started and what
11 it said last week. When the trial started, Harvard did not
12 discriminate, according to them, against ALDCs. They had to
13 say that because their expert actually conceded that ALDCs
14 were favored. Asian-American ALDCs were favored.

15 Now, recognizing that that is a fatal flaw in their
16 argument, what do they say at the bottom? Factually Harvard
17 does discriminate against ALDCs.

18 A 180-degree turn. Recognizing that they have to
19 make these turns, change in theory, change in law, change in
20 facts, what did they do? The same thing they did and I
21 mentioned to you at the closing three months ago, they
22 attacked the witnesses. They attacked the lawyers. They
23 attacked them in ways for which there's no justification.

24 So as we move into the specific claims, Your Honor,
25 let me start with important proof in the case that

1 Mr. Mortara didn't address, and that is Harvard's compelling
2 interest in achieving educational diversity and the benefits
3 of that diversity. That's important because it is the
4 predicate for what Harvard's done. It is a predicate for
5 what the Supreme Court has said.

6 So if I turn to Slide 10, the Supreme Court has
7 told us in *Fisher 2* that once a university gives a reasoned,
8 principled explanation for its decision to pursue those
9 benefits, that decision on the compelling interest of
10 diversity gets some deference.

11 On this record, we submit that Harvard has supplied
12 a reasoned and principled explanation for its decision to
13 pursue the educational and community benefits of diversity.

14 Harvard's commitment to the benefits of diversity
15 and its articulation of those benefits, on Slide 11, can be
16 found in the mission of Harvard College. It can be found on
17 Slide 12 in the report from President Rudenstine. And most
18 recently, it can be found on Slide 13 in the report of Dean
19 Khurana's committee, adopted unanimously by the full faculty
20 of arts and sciences, concluding that that student-body
21 diversity, including racial diversity, is essential to
22 Harvard's pedagogical mission, pedagogical objectives, and
23 institutional mission.

24 Perhaps more importantly, Your Honor, this interest
25 in a diverse student body was reflected by the day devoted to

1 the testimony of the Harvard students themselves. Your Honor
2 heard from several of those students. You heard their own
3 stories and how they and their classmates have benefited from
4 living and learning from each other in a diverse community.

5 These students, these eight students who came to
6 testify and took the stand, are living proof that Harvard has
7 a compelling interest and we all have a compelling interest
8 in communities that are diverse and inclusive.

9 Let me now turn the podium over to Mr. Waxman to
10 turn to the intentional discrimination count.

11 MR. WAXMAN: Good afternoon, Your Honor. I'll
12 start first with the claim of intentional discrimination and
13 then cover the race is more than a plus factor count of the
14 complaint, which is not addressed in the closing argument but
15 is something that Your Honor needs to rule on.

16 THE COURT: And I have some questions on that. So
17 I would appreciate it.

18 MR. WAXMAN: So the legal standard on intentional
19 discrimination, as Your Honor already adverted to, is pretty
20 straightforward. It's the one that Your Honor stated in
21 denying summary judgment. It's from *Goodman*, and it says
22 that to state a claim for intentional discrimination under
23 Title VI, the plaintiff, quote, must demonstrate that the
24 defendant discriminated on the basis of race, the
25 discrimination was intentional, and the discrimination was a

1 substantial or motivating factor for the defendant's actions.

2 There wasn't any dispute about that until SFFA
3 filed its first posttrial brief. Before then, SFFA agreed
4 with the Court and with Harvard on two fundamental points:
5 number one, the plaintiff bears the burden to prove
6 intentional discrimination; and number two, the *Arlington*
7 *Heights* standard governs the inquiry.

8 Now, SFFA has now tried to change course on both
9 points. Those new arguments are obviously inconsistent with
10 the Court's prior ruling, and they are incorrect. But they
11 are also largely irrelevant, given the evidence adduced at
12 trial.

13 First, as to the burden. SFFA's basic argument in
14 its posttrial briefs is that because Harvard considers race
15 in its admissions process, Harvard bears the burden to show
16 that its practices survive strict scrutiny.

17 But that argument doesn't distinguish between the
18 consideration of race in pursuit of diversity, which Harvard
19 does engage in, and the allegation in Count I that Harvard
20 discriminates intentionally against Asian-American applicants
21 relative to white applicants, which we vociferously dispute
22 and which would, in any event, have nothing to do with the
23 pursuit of diversity.

24 SFFA's claim in Count I depends on that second
25 disputed proposition, and SFFA bears the burden to prove it.

1 It can't evade its burden to prove intentional discrimination
2 against Asian-American applicants relative to white
3 applicants simply because it's undisputed that the admissions
4 process considers race as a plus factor in other ways.

5 This level of confusion in their part -- and maybe
6 it's just confusion -- was reiterated just now when my friend
7 cited the Supreme Court's decision in *Gratz* as evidence that
8 intentional discrimination doesn't require intentionality.

9 Let's be very clear. *Gratz* was not a case about
10 intentional discrimination. *Gratz* was a case in which the
11 University of Michigan undergraduate program was concededly
12 using race pursuant to a diversity rationale, and the Supreme
13 Court held that it failed strict scrutiny. It had nothing to
14 do with any burden to prove intentional discrimination.

15 Now, second, as to *Teamsters*. There are several
16 reasons why it's essentially irrelevant whether *Teamsters* or
17 *Arlington Heights* applies. One is that no one disputes that
18 SFFA can seek to rely on aggregate statistical evidence as
19 part of its claim. So the only serious question is whether
20 the Court should apply the *Teamsters* burden shifting
21 framework in evaluating that statistical evidence.

22 Even if that framework did apply, and even if
23 Dr. Arcidiacono's analysis were reliable and stark enough to
24 establish a prima facie case of intentional discrimination,
25 which as I'll explain it certainly is not, even in that

1 event, Harvard's only burden in response would be one of
2 production, to put in evidence a competing analysis that
3 calls Dr. Arcidiacono's into question. We've obviously done
4 that.

5 So at the end of the day under *Teamsters* or
6 *Arlington Heights*, the Court still has to resolve the
7 question whether Harvard intended to discriminate, and it
8 still has to do that by considering all the evidence,
9 nonstatistical and statistical. And under either standard,
10 statistical evidence isn't enough unless it is far, far more
11 stark than anything here.

12 The Supreme Court cases that -- the Supreme Court
13 subsequent later cases and circuit court cases have talked
14 about without exception are *Yick Wo* and *Gomillion*, which are
15 cases in which the disparity was so incredible, they rezoned
16 the City of Tuskegee to exclude all black people and include
17 all white people, that the Court said in that rare instance
18 the proof of a statistical disparity can in and of itself be
19 evidence of intentional discrimination.

20 THE COURT: What am I to do with the statistical
21 analysis that shows a penalty on the personal rating? Or if
22 you're going to get to that, keep going.

23 MR. WAXMAN: It would be a criminal default for me
24 not to get to it, given the emphasis. I'm happy to answer
25 any questions.

1 THE COURT: You can go in your orderly way. They
2 have the no-victim problem, but you guys have the personal
3 rating.

4 MR. WAXMAN: Absolutely. What I want to say here
5 is that even if the Court were to credit Dr. Arcidiacono's
6 methodology and accept his model, that would not carry SFFA's
7 burden under Count I.

8 Now, let me start -- I'll talk about the
9 nonstatistical evidence and then I'll talk about the
10 statistical evidence.

11 SFFA has told this Court in its posttrial
12 briefings, and it said as much during the trial, that it
13 views its nonstatistical evidence of intentional
14 discrimination as "not particularly important."

15 That is an incredible concession. SFFA received
16 more than 100,000 pages of documents. It took dozens of
17 depositions of witnesses of its choice. By its own
18 admission, it has little, if anything, to show for that.

19 What the evidence showed is that Harvard engages in
20 a dedicated effort to recruit students from all states,
21 across all socioeconomic strata, and of all races. It showed
22 that Asian-Americans are one of the five demographic groups
23 targeted by the undergraduate minority recruitment program.
24 It showed an admissions process that is driven by open
25 discussion among 40 people, a process in which every

1 admissions officer has complete access to every application
2 file, a process in which the ratings that the initial readers
3 assign are not used to decide who gets in and who does not
4 but rather as an initial shorthand reflection of some of the
5 information that admissions officers consider in making their
6 decisions.

7 You heard live testimony from eight members of the
8 admissions office. SFFA says that those witnesses can't be
9 believed, that there is no reason for Your Honor to believe
10 them.

11 Each described the same process. They consistently
12 explained that they based their decisions on the full range
13 of information that is available to them. They consistently
14 explained that everything in the application file matters,
15 with race as one of many factors that is considered. And
16 they consistently explained that they have never seen any
17 evidence of bias or discrimination in the process. That is
18 the nonstatistical record in this case, which is why SFFA
19 wishes that it were "not particularly important."

20 Now, SFFA keeps telling us that the law doesn't
21 require it to produce smoking-gun evidence. That is true,
22 But it is equally true that the absence of any direct
23 evidence of discrimination is a powerful indication of the
24 absence of discrimination especially in a process that has so
25 many participants as Harvard's does.

1 It's not just that SFFA has failed to supply a
2 smoking gun. They failed to provide evidence of a single
3 victim of discrimination. They have failed to find a single
4 current or former employee who has witnessed even one
5 instance of discrimination. In a case in which SFFA says
6 that scores of Asian-American applicants are denied admission
7 each year because of intentional discrimination, where is the
8 evidence?

9 Well, SFFA's expert, who said that he read 480
10 files and many more summary sheets, discussed, as we heard
11 again today, the figure skater, a single application that in
12 his view might suggest discrimination because a qualified
13 Asian-American candidate was denied admission.

14 As Your Honor knows, literally thousands of
15 students with perfect scores and/or perfect GPAs are denied
16 admission every year. Applicants of all races with
17 compelling stories and competitive credentials are not
18 admitted. Tellingly, SFFA asked no Harvard witness, not a
19 single one of them, about that rejected applicant or any
20 other.

21 So what does SFFA point to? Pardon me. I'm on
22 what I hope is the back end of the flu.

23 THE COURT: Is it your Marco Rubio moment?

24 MR. WAXMAN: Excuse me?

25 THE COURT: Is it your Marco Rubio moment?

1 MR. WAXMAN: So first of all, SFFA says that
2 Harvard discriminates in its recruiting practices against
3 Asian-Americans who live in what the admissions office calls
4 Sparse Country.

5 Here are the relevant facts. For the classes of
6 2014 to 2016, Harvard sent recruiting letters to
7 Asian-American students across the country who scored lower
8 on the PSAT than the white students who received those
9 letters. For the classes of 2017 through 2019, in most
10 states Harvard sent recruiting letters to Asian-American and
11 white students at identical thresholds.

12 In those three years, in the Sparse Country states,
13 Harvard sent recruiting letters to white students who
14 received lower PSAT scores than Asian-Americans, but at the
15 same time Harvard applied an identical cutoff on the ACT for
16 sending recruiting letters to Asian-American and white
17 students in Sparse Country. And as Your Honor heard, the ACT
18 is by far the dominant test in those states.

19 That is their grand recruiting conspiracy. There
20 was no evidence that the difference in the PSAT cutoff for
21 those three years was intentional, there was no evidence that
22 it was a result of unconscious bias, and there was no
23 evidence that it mattered. Harvard does not provide an
24 admission tip to applicants who receive recruiting letters.

25 Now, next let me address the work of Harvard's

1 Office of Institutional Research. SFFA says that OIR's work
2 provides key support for its intentional discrimination claim
3 and that Dean Fitzsimmons's reaction to OIR's work
4 establishes deliberate indifference to discrimination. Those
5 assertions bear no relation to reality.

6 You'll recall that initially SFFA focused much of
7 its attention on a document prepared by Mark Hansen, who you
8 heard. This is Plaintiff's Exhibit 9. But at trial,
9 Mr. Hansen explained that the document comprised his working
10 notes, that he doubted he ever shared it with anyone,
11 including his boss, Ms. Driver-Linn, and certainly not Dean
12 Fitzsimmons, which is unsurprising because it's full of
13 errors. The subtitle is "Subtitle." The date is wrong by a
14 year. Entire pages of these working notes, including notably
15 the conclusion page, are blank.

16 For her part, Ms. Driver-Linn testified she'd never
17 even seen Exhibit 9 before this litigation and certainly
18 didn't show it to Dean Fitzsimmons.

19 And yet, unconstrained by the record, in its
20 posttrial briefings SFFA continues to insist that Dean
21 Fitzsimmons saw this document. In its finding of fact 118,
22 SFFA says, "OIR gave this report to Fitzsimmons."

23 In its response, SFFA doubles down, claiming in
24 Paragraphs 175 through 177 that "Fitzsimmons was shown
25 Exhibit 9 before this litigation, as were Driver-Linn and

1 Bever, and that it "provided Fitzsimmons with extensive
2 statistical evidence that Harvard penalizes Asian-Americans."

3 Not only does SFFA have no evidence to support
4 those assertions, the evidence at trial flatly contradicts
5 them. Now, OIR did show Dean Fitzsimmons the four models
6 that so preoccupied us all at trial to simulate what the
7 admitted class would look like under certain oversimplified
8 admissions practices.

9 As Mr. Hansen explained those models, which were
10 his very first effort ever at using statistical regression,
11 were not meant to show the effect of any given factor in the
12 admissions process. They omitted far too many factors to do
13 so.

14 And as Your Honor heard, the fact that the racial
15 composition of the simulated class so closely matches that of
16 the actual class signified nothing. It's simply a function
17 of the circularity of the model that Mr. Hansen used which
18 used the racial composition of the actual class in order to
19 predict the racial composition of the hypothetical class.

20 For his part, since this is all about Dean
21 Fitzsimmons, Dean Fitzsimmons testified that his takeaway
22 from this was simple. The more factors you add to a model of
23 the admissions process, the more closely you resemble
24 reality. He certainly did not view OIR's work as evidence of
25 discrimination.

1 SFFA then invokes the memorandum that OIR sent Dean
2 Fitzsimmons about low-income applicants, claiming that the
3 dean did nothing in response.

4 Once again, that's not true. In response to that
5 memorandum, the dean asked OIR to look into whether
6 low-income Asian-American applicants received a tip. The
7 answer was, yes, a low-income tip as large or larger than the
8 one given to applicants of any other race. The dean
9 explained to you under oath why he was reassured.

10 Your Honor, this is an intentional discrimination
11 case. Why on God's green earth, in a system that intended to
12 discriminate against Asian-American applicants, would the
13 dean ask for, receive, and then be reassured by data that
14 showed him and he was told that Asian-American applicants
15 receive perhaps the most significant low-income tip of any
16 group?

17 In other words, the reason Dean Fitzsimmons didn't
18 sound the alarm in response to the documents, as SFFA says he
19 should have, is that he didn't understand the documents even
20 to show smoke, let alone a fire.

21 Now, in its posttrial brief the plaintiff has
22 offered an explanation for how to interpret the chart of
23 coefficients that are attached to the low-income memo. On
24 their face, P28 offers no such explanation. There is no
25 evidence from which the Court can infer that Dean Fitzsimmons

1 should have understood those charts as SFFA claims they were
2 meant to be understood. Even Ms. Bever, who was the deputy
3 director of OIR and was involved in the creation of this
4 document, disagreed that SFFA's interpretation -- that is,
5 Dr. Arcidiacono's interpretation -- was the correct one.
6 That is on pages 234 to 236 of the transcript of October 18.

7 Even if SFFA were correct that Dean Fitzsimmons
8 should have done more in response to OIR's work, that would
9 get SFFA no closer to proving intentional discrimination.
10 Even if this Court were to import the deliberate indifferent
11 standard from Section 1983 cases into the Title VI context,
12 SFFA would still have to show that the dean actually knew
13 that the admissions office was actually discriminating but
14 chose to do nothing.

15 Now, we've seen on the chart the coefficient that
16 Mr. Mortara showed you with a negative 0.37 attached to
17 Asian. He says that showed Dean Fitzsimmons, who apparently
18 taught introductory statistics in the 1960s, that this was
19 discrimination. But Dean Fitzsimmons wouldn't have learned
20 much about statistics if he thought that that showed
21 discrimination. It doesn't. It shows a weak correlation
22 with between Asian-American ethnicity and outcomes in a very,
23 very incomplete model. Just as, Your Honor, OCR found a
24 disparity between Asian-Americans and white applicants, and
25 yet doing the work of -- doing the heavy work of auditing the

1 files found no evidence of discrimination.

2 SFFA did not argue, nor could it, that the dean
3 actually knew that the admissions office was actually
4 discriminating. Its theory, at most, is that OIR's work put
5 Dean Fitzsimmons on notice of the possibility of
6 discrimination. Under the case law, a failure to investigate
7 a possibility of discrimination, even if proven, which it was
8 not, does not establish intentional discrimination.

9 So now let me turn to another focus of what has
10 morphed into SFFA's case about intentional discrimination,
11 which is stereotypes.

12 SFFA says that Harvard, through no fault of the
13 good people in the admissions office, are engaging in anti
14 Asian-American stereotypes. As Mr. Lee observed earlier,
15 this is the latest in SFFA's progression of theories of
16 discrimination in search of facts. But here again, there is
17 just no evidence of stereotyping. None apparently that SFFA
18 could find in the hundreds of application files and summary
19 sheets that were produced.

20 That's why SFFA spent so much time in its posttrial
21 findings about a handful of comments that the Office of Civil
22 Rights found in files that it reviewed in the late 1980s.
23 It's why its posttrial briefs cite a government report in
24 multiple law review articles for the proposition that
25 stereotyping occurs in the world. That's why SFFA quotes at

1 length in its posttrial filings, and in the present tense,
2 from an article that Margaret Chin prepared 36 years ago,
3 without bothering to acknowledge Ms. Chin's testimony in this
4 very court about the immense strides that have been made
5 since then, not just generally but at Harvard in particular.

6 SFFA did all that because it has no actual evidence
7 of stereotyping in Harvard's admissions process. It points
8 to a handful of comments in a single docket binder that
9 itself contains handwritten notes with respect to between
10 four and 5,000 applicants. It deemed two of those notes
11 important enough to feature at trial.

12 In one comment, the applicant is noted as "very
13 quiet." And in another comment, "quiet and strong." Those
14 two applicants cherry-picked out of this binder happened to
15 be Asian-American.

16 What SFFA did not do was to ask Dean Fitzsimmons,
17 or for that matter, any of the other seven witnesses from the
18 admissions office, about other comments in the same docket
19 binder that describe white, African-American, and Hispanic
20 applicants as "shy," "understated," "quiet." There is no
21 reason to believe that any of these notations are anything
22 other than accurate characterizations of the applicants.

23 I guess I'd better get going.

24 When OCR did its review, it noted that certain
25 comments that might be characterized as stereotypical had,

1 quote, actually originated from the interviews, teacher or
2 counselor recommendations, or self-descriptions given by the
3 applicant. But when it went on to examine the files, it
4 found no evidence of discrimination by stereotype. Here SFFA
5 hasn't even tried to tie any supposed stereotypical language
6 to any adverse outcomes.

7 The charge that Harvard is engaged in racial
8 stereotyping, a practice that Dean Fitzsimmons characterized
9 as aberrant and deeply offensive, is utterly unsupported by
10 the record.

11 Let me now turn to the statistical evidence. And
12 for the sake of relative simplicity, I'll focus on two
13 issues, the descriptive statistics and the personal rating.

14 SFFA has given up lots of descriptive statistics
15 showing differences in rating or admission outcomes by race,
16 generally focusing on the academic index deciles, which just
17 compare applicants with similar high school grades and SAT
18 scores.

19 Those statistics don't try to analyze the effect of
20 a given factor controlling for others. That's what a
21 regression does.

22 Because SFFA's statistics don't control for the
23 many noneconomic factors that matter so much in the process,
24 or even for the academic factors beyond high school scores,
25 they tell you very little. To a very significant degree, the

1 descriptive statistics just reflect Harvard's persistent and
2 wrong-headed view that the admissions process is all about
3 high school grades and test scores.

4 Let's turn now to the regression analysis. The
5 main dispute having to do with the regression analysis, the
6 only one we really heard today, has to do with the personal
7 ratings. You have heard sworn testimony in which admissions
8 officers sat in that witness chair and testified over and
9 over again that they do not consider race in assigning the
10 personal rating.

11 Here are just a few of the key pieces of testimony.
12 Their testimony was consistent and credible, and nothing in
13 the class of 2023 reading procedures is to the contrary.

14 Those procedures, as Director McGrath testified,
15 simply codify Harvard's consistent practice. So the real
16 question in this case as to the personal rating, Your Honor,
17 is whether there is enough statistical evidence that race
18 is -- race per se is considered in the personal rating for
19 Your Honor to conclude that those admissions officers are all
20 either lying or mistaken. The answer to that question is no,
21 and it is not close.

22 First, recall that OCR found a very similar
23 difference between the average personal rating of
24 Asian-American and white applicants. OCR did not find,
25 nonetheless, on a further review of the files that race was

1 an element of the personal rating. It told you -- it stated
2 in its report that it went and did the actual file review to
3 determine whether racial differences observed in the rating
4 factors could reflect racial bias. It did the work that SFFA
5 either didn't do or didn't tell us about, and it issued a
6 report concluding that the answer was no.

7 SFFA is relying on Dr. Arcidiacono's regression
8 model of the personal rating. But as Dr. Card explained,
9 there is a difference between correlation and causation.
10 Regression estimates can't measure causal effects unless the
11 model controls for all factors that are correlated with a
12 variable of interest and that affect the outcome.

13 A regression just spits out a number. And if the
14 regression is missing information that could help explain the
15 outcome, then the number that the regression spits out simply
16 doesn't tell you whether that factor is actually causing the
17 estimated effect. That's what Dr. Card showed you with his
18 whiteboard example about how age and salary affected a
19 worker's likelihood of retirement.

20 Now, SFFA, in its posttrial briefings, makes what
21 is really an astonishing assertion, which is the assertion
22 that if the effect that is estimated by a regression is
23 statistically significant, then it must be a genuine causal
24 effect.

25 I can't even begin to tell you how wrong that is.

1 If a regression is missing relevant factors, it may estimate
2 statistically significant effects that are not genuine causal
3 effects. Nobody versed in statistics could possibly agree.
4 I am certain that if Dr. Arcidiacono were on that stand
5 today, he'd tell you how wrong it is.

6 So now back to the personal rating. Everyone
7 agrees that there are many, many factors that are not
8 included in the model that affect the personal rating.
9 Indeed, the factors in Dr. Arcidiacono's model explain only
10 29 percent of the variation in the personal rating.
11 71 percent of the information that goes into determining what
12 the personal rating would be is unobserved. It is not
13 available in the data.

14 The question for Your Honor with respect to this
15 point is whether the negative effect that is estimated by
16 Dr. Arcidiacono's model can be attributed to those factors,
17 the 71 percent that is outside the record.

18 SFFA says no. And the reason it gives is that
19 Asian-American applicants are supposedly stronger than white
20 applicants on the factors that are in the data that affect
21 the personal rating. If that's true, SFFA says, it's fair to
22 assume that they are also stronger on factors outside the
23 data. And if that's true, then the negative estimate that
24 Dr. Arcidiacono's model produced may not be attributable to
25 the 71 percent of factors that are outside the data.

1 The problem with this entire hypothesis of
2 Dr. Arcidiacono is that SFFA is wrong about the premise. The
3 applications submitted by Asian-American applicants are not
4 stronger than those of white applicants on the factors in the
5 data that affect the personal rating. As Dr. Card showed,
6 precisely the opposite is true. White applicants on average
7 scored higher than Asian-American applicants on the school
8 support ratings. The same was true for the alumni ratings.

9 And Dr. Card showed the very same thing for the
10 combination of all non-academic factors in the model. And he
11 did it twice, both with a slide with the personal rating and
12 the ALDC characteristics included, and then with a slide with
13 those two things excluded.

14 The reason that Dr. Arcidiacono obtained a contrary
15 result was because he removed the ALDC applicants who are
16 mostly white and indeed are many of the very strongest white
17 applicants. And by larding into his model academic data,
18 even though the personal rating reflects non-academic
19 factors, not academic factors, the Court -- in answer to
20 Mr. Mortara's rhetorical challenge here, the Court doesn't
21 have to find the reason, as if there is the reason, that
22 these Asian-American applicants in the database received
23 marginally lower personal ratings on average. It just has to
24 find that SFFA has failed to prove that the cause of this
25 disparity was racial bias. When one after another admissions

1 officer testified that they don't consider race, and when, as
2 Dr. Card explained, Dr. Arcidiacono's model of the personal
3 rating didn't come close to proving a causal effect of race.

4 Now, one last point on the personal rating. SFFA
5 keeps saying, as if repetition will make it true, that if the
6 personal rating is somehow affected by race, that it has to
7 be removed completely from the model.

8 Dr. Card explained in detail why that isn't right.
9 Even if the personal rating were affected to some degree by
10 race, it nonetheless captures a tremendous amount of
11 information that isn't affected by race and that is otherwise
12 unobservable, like applicant essays, for example, or
13 recommendation letters other than the two teacher letters and
14 the guidance counselor letters.

15 So even if a hypothetical situation in which a
16 portion of the personal rating could be fairly attributed to
17 racial bias, that is the marginal effect that Dr. Arcidiacono
18 found, the right thing wouldn't be to throw out the personal
19 rating entirely, it would be just to take out the part that
20 is supposedly affected by race.

21 And as you saw when Dr. Card adjusted the profile
22 ratings from that way, he found again no evidence of bias
23 against Asian-American applicants. That is the analysis that
24 SFFA really doesn't want you to think about, which is why
25 they keep saying incorrectly that the only option is to take

1 the rating out.

2 Their exclusion of the personal rating is just
3 emblematic of the consistent difference between their
4 analysis and ours. Harvard's analysis tries to model the
5 actual admissions process, and they don't. Their preferred
6 model excludes the ALDCs, fully 30 percent of the admitted
7 students. It ignores factors that demonstratively matter to
8 the admissions outcomes, like the staff interview, parental
9 occupation, intended career, and of course the vast
10 information that is reflected in the personal rating.

11 By contrast, Harvard's analysis includes the data
12 that SFFA wishes to ignore, although the admissions committee
13 considers. It includes the applicants that SFFA wishes to
14 ignore, and its faithfulness to the process leads to a more
15 reliable measure of the effective race. That analysis shows
16 that race has no effect on the admission of Asian-American
17 applicants relative to white applicants.

18 That was true, as Your Honor saw in Dr. Card's main
19 model, which I've just described. It is true when you allow
20 the effects of the ALDC characteristics to vary by race and
21 vice versa, which SFFA insisted should be done. Same
22 results. It's true when you exclude recruited athletes,
23 which are -- SFFA said somehow their inclusion biases the
24 result because for athletes things like academics don't
25 matter that much. He excluded the recruited athletes, same

1 result.

2 And it's true when you modify the profile ratings
3 to remove the supposed effects of race, that is the marginal
4 effects that Dr. Arcidiacono found when modeling the factors.

5 So to sum up, even if in theory an intentional
6 discrimination case could be based only on statistics, a
7 circumstance that is reserved under governing case law not
8 for any case in which some expert can come up with a
9 statistically significant effect, but for exceptionally stark
10 cases like *Yick Wo* and *Gomillion*, the statistical evidence in
11 this case doesn't even establish a correlation between
12 Asian-American ethnicity and admissions outcomes, much less
13 that Harvard intentionally discriminates against
14 Asian-American applicants.

15 So in my remaining three to four minutes, I'll
16 address the more than a plus factor count. Again let me
17 start by summarizing the law, which is largely undisputed, at
18 least in its broad outlines. I've displayed the key points
19 on the slides here.

20 The Supreme Court has held that a university may
21 consider race only as a plus in a particular applicant's file
22 without insulating the individual from comparison with all
23 other candidates for available seats. It's held that when
24 using race as a plus factor, a university's admissions
25 program must remain flexible enough to ensure that each

1 applicant is evaluated as an individual, not in a way that
2 makes the applicant's race or ethnicity the defining feature.

3 And the Court has forbidden, quote, mechanical
4 predetermined diversity bonuses based on race or ethnicity,
5 but conversely, it's made clear that race can make a
6 difference as to whether an application is accepted or
7 rejected.

8 The evidence in this case showed that Harvard's
9 consideration of race satisfies those requirements in every
10 respect. Admissions officers took the stand one after
11 another, and they testified that they consider race as only
12 one among many other factors. They don't award any fixed or
13 formulaic preferences, and they consider race in an
14 individualized way in the context of each applicant's life
15 story.

16 SFFA tries to support its contrary argument by
17 relying on statistical evidence. But let's look at the full
18 story on those statistics, which are essentially undisputed.

19 First, the statistics show that knowing an
20 applicant's race tells you almost nothing about whether he or
21 she will be admitted. I'm sure Your Honor -- well, I'm not
22 sure. In light of Your Honor's recent labors, maybe you
23 don't remember the slide.

24 But then that takeaway is if you know the
25 applicant's race and nothing more, you can explain 2/10 of

1 1 percent of the probability that that person will be
2 admitted. That is an incredible number, and it proves that
3 race is anything but the defining feature of the admissions
4 process.

5 Secondly, the statistics show that for highly
6 competitive applicants who would be on the bubble for
7 admission, no matter what their race, any number of factors,
8 including but by no means limited to race, have a meaningful
9 effect.

10 To understand why, recall again Dr. Card's
11 retirement example. If you're 40, growing a year older isn't
12 going to significantly affect your likelihood of retirement.
13 If you are 78, the same is true, you're probably going to
14 retire anyway. If you are 67 or 68 and right on the bubble
15 of retirement, then the additional year may mean a lot. And
16 the same is true for admission to Harvard.

17 Here is the graph that Dr. Card used, showing that
18 there are basically no applicants who are assured of
19 admission to Harvard. There are lots of applicants who
20 effectively have no chance. There are about 25 percent who
21 are, as he called it, on the bubble. That is, given the
22 constellation of the strengths in their application,
23 competitive enough that any one additional factor can push
24 them over the top, it's for those people that race can and
25 does have a meaningful effect and so can many other factors.

1 That's shown by the graphs on the next slide. For
2 most applicants, race has no effect whatsoever on their
3 likelihood of admission. It has a meaningful effect only for
4 candidates who would be competitive for admission no matter
5 what their race. And for those candidates, the effect of
6 race isn't disproportionate to the effect of other factors
7 like academic excellence, extracurricular excellence, or
8 excellent personal qualities.

9 Every additional factor has a large effect for
10 highly competitive candidates.

11 Now, SFFA likes to emphasize that in the aggregate
12 the consideration of race significantly increases the number
13 of African-American and Hispanic students at Harvard. That
14 is true. That is a feature of the system, not a bug. It's
15 not only permitted by the Supreme Court's jurisprudence, it's
16 expressly envisioned by it.

17 The Supreme Court recognized in *Fisher 2* that race
18 can "make a difference to whether an application is accepted
19 or rejected." It raised that the whole point of considering
20 race is to increase the admission of minority students who
21 otherwise "might not be represented in meaningful numbers."

22 Indeed, the Court in *Fisher* pointed favorably to
23 the fact that the consideration of race in that case caused a
24 54 percent increase in Hispanic candidates and 94 percent
25 increase in African-American candidates enrolled through the

1 University of Texas's holistic review program, an effect the
2 Court called "meaningful if still limited."

3 And in *Parents Involved*, a case that SFFA loves to
4 invoke, the Court pointed favorably to the fact that in
5 *Grutter*, consideration of race was necessary to achieve
6 diversity because doing so tripled minority enrollment.

7 I'm ready to turn the podium over to the marvelous
8 Mr. Lee.

9 MR. LEE: Your Honor, let me turn to the claim that
10 Harvard engages in racial balancing.

11 Again, as Mr. Waxman did in each of the claims, let
12 us set out what the law is. In Slide 48, we have what the
13 Supreme Court explained that a university is not permitted to
14 define diversity as some specified percentage of a particular
15 group merely because of the race or ethnic origin of the
16 group. But the Court also explained that some attention to
17 numbers without more does not transform a flexible admissions
18 system into a rigid quota. The evidence shows that Harvard
19 complies with just this longstanding precedent.

20 At Slide 49, each and every admissions officer who
21 testified consistently that there are no targets, there are
22 no quotas, on Slide 50. There are no floors on Slide 51.
23 And Dean Fitzsimmons confirmed that for the entirety of the
24 time he's been there.

25 That testimony is also supported by the statistical

1 evidence, largely uncontested, which shows meaningful
2 year-to-year differences in the racial composition of
3 Harvard's admitted and matriculating classes.

4 The plaintiff, Your Honor, disputed none of this,
5 not today in closing, not in the first closing, and not
6 during the course of the trial. To remind Your Honor, their
7 expert had an opinion on racial balancing in his report. He
8 did not offer it. He did not offer it at all, or any other
9 opinion.

10 So having no expert opinion, what does SFFA rely
11 upon? It relies upon the recruitment letters for Sparse
12 Country, which Mr. Waxman has already addressed, and I'm not
13 going to reiterate the chronology of those letters.

14 And the one-pagers. So let me talk really quickly
15 about the one-pagers. At Slide 56, Your Honor, we have the
16 different categories that the one-pagers include.

17 There is, as Your Honor knows, much more
18 information than just race. They include information on
19 gender, geography, intended major, legacy status, residency,
20 and financial aid. They're used to keep a rough tab or rough
21 finger on how the composition of the tentatively admitted
22 class compares to that of prior classes across all of these
23 different dimensions.

24 Now, the plaintiff suggests that the fact that
25 these one-pagers were created as key milestones in the

1 admissions cycle is evidence that too much attention is being
2 paid to the numbers. It is not. It is not surprising that
3 the dean and director of admissions want to be aware if there
4 is a dramatic drop-off in the diversity of the class in any
5 dimension.

6 That's exactly the kind of attention to numbers the
7 Supreme Court expressly held does not transform a flexible
8 admissions system into a rigid quota. And if Your Honor
9 considers the *Grutter* decision, you will see that the dean of
10 admissions was receiving daily one-pager reports during the
11 height of the admissions season in exactly the same way that
12 Harvard does.

13 As Your Honor has heard, the primary purpose of the
14 one-pagers is to ensure that Harvard, a residential college
15 with a fixed number of beds, does not admit more students
16 than it has room for. The yield rate, the percentage of
17 admitted students who then decide to come to Harvard, varies
18 by categories, and the category is listed on the one-pagers.

19 If the tentatively admitted class has more students
20 than the prior year in a category with historically lower
21 yield rates, the dean knows there is room to admit a few more
22 students.

23 Conversely, if a tentatively admitted class has
24 more students in groups with historically higher yield rates,
25 the dean knows that fewer overall students can be admitted.

1 This has simply nothing to do with racial
2 balancing. That's why the plaintiff's expert offered no
3 opinion on racial balancing. That's why he didn't contest
4 Dr. Card's presentation on racial balancing. The proportion
5 of African-American students, Hispanic-American students, and
6 Asian-American students, as you can see from Slide 57, has
7 steadily risen over several decades. And those percentages
8 have varied significantly from year to year. That is
9 anything other than racial balancing.

10 Now, the final claim concerns race-neutral
11 alternatives. Again the law. The Court has been clear that
12 universities need not, and I quote, "exhaust every
13 conceivable race-neutral alternative to a race-conscious
14 admissions process."

15 The burden on us in this circumstance is to show
16 that the race-neutral alternatives that are both available
17 and workable would not suffice to achieve the diversity and
18 the educational objectives of Harvard.

19 Critically, the Supreme Court has said, and we
20 quote it on Slide 59, that the university does not need,
21 cannot be forced to choose between maintaining its reputation
22 for academic excellence and fulfilling its equally important
23 commitment to provide educational opportunities for members
24 of all racial groups.

25 The evidence shows no combination of race-neutral

1 practices would allow Harvard to achieve a comparably diverse
2 class without compromising the academic excellence of the
3 class.

4 That is precisely what the Smith committee
5 examined. They looked at the proposed alternatives more than
6 Mr. Kahlenberg suggested. They looked at what happened when
7 these proposed alternatives were implemented. They looked at
8 the history of alternatives like dispensing with early action
9 or increased financial aid and what happened. They looked at
10 the literature and they evaluated the effect of those
11 alternatives: an intellectual excellence at Harvard, the
12 broader excellence at Harvard in many dimensions, and the
13 diversity of the class.

14 What did the plaintiff offer in response? Just
15 Mr. Kahlenberg. Mr. Kahlenberg testified that the committee
16 considered the right race-neutral alternatives. He testified
17 that the committee considered them according to the right
18 criteria. In the end, he just disagrees with the judgment of
19 the committee.

20 Now, although he didn't do it, the plaintiff
21 attacks the process. And I quote this because I think it's
22 unfair. They describe the committee's work or composition as
23 almost comical.

24 You heard Dean Smith, Dean Khurana, Dean
25 Fitzsimmons, collectively a group of people with nearly five

1 decades of experience in university administration and
2 admissions. We think that it's clear that they didn't
3 deserve the vitriolic attack that their work is almost
4 comical.

5 Compare that to Mr. Kahlenberg, who had never been
6 in university admissions, who had never implemented a
7 minority recruitment program, who had never implemented
8 financial aid program, who had never been retained by a
9 college or a university to consult on a race-neutral
10 alternative.

11 Mr. Kahlenberg, who was paid to consult on the
12 drafting of the complaint. Mr. Kahlenberg, who the day after
13 the complaint was filed before there had been a single
14 document produced, a single deposition, a single expert
15 report, went on Fox News and pronounced judgment on Harvard,
16 a judgment that he stuck to. And his judgment was that there
17 are race-neutral alternatives that wouldn't compromise the
18 academic integrity of Harvard and the diversity of Harvard.

19 Mr. Kahlenberg, as you now know, has vastly
20 different conceptions of what the academic excellence is that
21 is the core of Harvard's mission, and he has a radically
22 different view of what diversity is and should be at a
23 university.

24 On academic excellence, he had a very narrow set of
25 simulations based only upon test scores and GPAs. And as

1 Your Honor knows, those are not the drivers for the
2 composition of the Harvard class. The Harvard admissions
3 officers consider much more.

4 Dr. Card showed that if you took Mr. Kahlenberg's
5 alternatives and other alternatives, you would significantly
6 reduce the number of students on campus with academic ratings
7 of 1 or 2. You would significantly reduce the academic
8 excellence of the class.

9 Mr. Kahlenberg's definition of what is racially
10 diverse and what is acceptable as racial diversity was
11 equally off the mark. Every one of his complicated
12 alternatives and some of his alternatives, as Your Honor
13 knows, are based upon assumptions that are just not --
14 they're just not based in reality -- show a drop in the
15 proportion of African-American students on campus from 14 to
16 10 percent.

17 Now, that's not a drop of 4 percent, as they
18 suggest to you in their filings. That's a drop of
19 30 percent. The plaintiff is confusing a drop, a percentage
20 drop with absolute percentage points. A drop from 14 percent
21 to 10 percent of the African-Americans on campus would reduce
22 the number of African-Americans by 320.

23 How does Mr. Kahlenberg and SFFA address that?

24 MR. MORTARA: Your Honor, we're five minutes over.
25 As long as I get them, I'm fine.

1 THE COURT: You are over.

2 MR. LEE: I'm close. Can I have three minutes?

3 MR. MORTARA: Can I have eight, Your Honor?

4 THE COURT: Do you really need all eight?

5 MR. MORTARA: I probably won't, Your Honor, but
6 this also happened in opening. The Harvard rules for Harvard
7 and SFFA rules for SFFA gets a little tiresome.

8 THE COURT: You can have eight. I'm going to let
9 the Amici go before you go, though.

10 MR. LEE: I'm not even going to dignify the
11 suggestion there have been different rules for Harvard and
12 for SFFA with a response. It's not entitled to one.

13 How did they respond? They say that a 30 percent
14 decrease in number of African-Americans is a slight decrease.
15 That's their response to you. But the Smith committee told
16 you it's not slight. More importantly, the students you saw
17 have told you that it's not slight.

18 So as we finish what we began in October, let me
19 suggest it would be useful to step back from all of the
20 detail, the statistical detail, the nonstatistical detail,
21 and look more broadly. What do we see?

22 At Slide 62 on the screen, we can see what has
23 happened to the number of Asian-Americans at Harvard College
24 over time, from 3 percent in 1980 to the 20-some percent
25 where it is today. These numbers have increased

1 substantially. But at the same time, the number of
2 African-Americans and Hispanic students have increased as
3 well.

4 The plaintiffs nevertheless claim that
5 discrimination has affected hundreds of Asian-American
6 students over six years and 160,000 applications. They
7 suggest to you that there have been hundreds of
8 Asian-American applicants that have been discriminated
9 against and disadvantaged.

10 And as Mr. Waxman and I have both pointed out
11 repeatedly, they have not identified one. They have failed
12 to produce a single rejected applicant who claims
13 discrimination. They have failed to produce a single file.

14 Now, Your Honor, Harvard, like many other
15 institutions of higher education, has recognized, as I said,
16 the compelling interest in creating communities through
17 diverse in many respects. Those institutions -- not us
18 alone, but many other institutions of higher education have
19 invested enormous time, effort, and energy over many years in
20 recruiting and enrolling students from a wide variety of
21 racial, ethnic, socioeconomic, geographic, and other
22 backgrounds.

23 As President Simmons testified, and I quote on
24 Slide 65, how can we imagine a world in which we are not
25 creating leaders and citizens who have the capacity to

1 mediate differences? I cannot imagine it.

2 And as President Faust testified, on Slide 66,
3 we've made progress, but there much to be done.

4 That is why the plaintiff's expert conceded, as
5 shown on Slide 67 that SFFA's analysis and his analysis is
6 one where there are winners -- whites and Asian-Americans --
7 and one where there are losers -- African-Americans and
8 Hispanics.

9 Buried in two footnotes in SFFA's briefing is the
10 evidence of SFFA's real ambition, to ask the Supreme Court to
11 change the law and forbid the consideration of race by
12 Harvard and other universities like it.

13 As the plaintiff's own slide show -- and I'm
14 putting now up on Slide 69 one of the slides from their own
15 expert's testimony -- at Harvard College, without any of the
16 ineffective race-neutral alternatives Mr. Kahlenberg
17 proposes, the elimination of race would result in a drastic
18 reduction of the number of African-American and Hispanic
19 students on campus. That result would be wrong bigly; it
20 would be wrong morally.

21 Your Honor, the course the plaintiff urges you to
22 take is one that would undercut the considered judgment of
23 educators at Harvard and elsewhere that diversity enhances
24 the community and the learning that takes place in
25 classrooms, around the dining tables, and on playing fields.

1 It would leave generations of young Americans less equipped
2 to thrive in and to confront the challenges in an
3 increasingly complex world. And it would send the message
4 and it would create the reality that American universities
5 are no longer the cradles of opportunity and its beacons of
6 social mobility.

7 Congress cannot have possibly intended that
8 Title VI, a statute enacted to expand opportunity, would be
9 used to contract the opportunity that's been made available
10 to so many people who have not historically had that
11 opportunity.

12 Thank you.

13 THE COURT: Thank you.

14 Mr. Mortara, how many extra minutes do you get?

15 MR. MORTARA: According to Mr. Hughes, it will be
16 ten. I am certain I will not use it, but I won't be rushed.

17 THE COURT: I'm going to give you some time to
18 figure out how to use your extra ten minutes and let the
19 Amici go next.

20 MR. MORTARA: That's great.

21 MS. TORRES: Your Honor, we have prepared slide
22 deck copies, if you would like one, as well as for the
23 parties.

24 And if I can quickly correct myself, I am joined by
25 Emma Dinan from Arnold & Porter and from MJ Rosner, one of

1 our co-counsel in the case.

2 Race-blind admissions is an act of erasure. To try
3 to not see my race is to try to not see me.

4 It was on the witness stand right there that Sarah
5 Cole shared this sentiment, and Sarah was not alone. Eight
6 Harvard students and alum testified at trial for student
7 Amici: Thang, Sally, Itzel, and Sarah, along with
8 organizational Amici.

9 All eight shared their ethnicity with Harvard when
10 applying because all eight felt it was an integral aspect.
11 All eight testified that Harvard's racial diversity, a
12 product of its admissions process, positively shaped their
13 educational experience. They engaged in cross-racial
14 conversations that were mind opening, met other students of
15 color who were their saving grace and learned lessons that
16 made them better physicians, teachers, policy makers, and
17 citizens.

18 SFFA did not challenge these facts. And at points,
19 it outright agreed that race and racial diversity remains
20 vitally important in today's society.

21 Instead, the plaintiffs have engaged in their own
22 act of erasure. They did not call a single student to
23 testify, and its experts did not consult a single student to
24 form their opinions. The plaintiffs have tried to erase
25 countless student stories by placing undue emphasis on its

1 flawed statistical analysis and by ignoring the wealth of
2 evidence in the students' application files. That evidence
3 is persuasive proof that Harvard's appreciation of race is
4 lawful and critical for cultivating citizen leaders.

5 As this Court knows, the plaintiffs tried to
6 achieve its singular goal of banning the consideration of
7 race by advancing two distinct legal theories, starting with
8 the claims against Harvard's policy promoting diversity.

9 The legal standard is straightforward. Harvard
10 must show that it is both necessary and individualized.

11 Necessity is established by three undisputed facts.
12 The first, race provides critical context for accurately
13 assessing many applicants' strengths and contributions. This
14 was true for Itzel, whose personal essay, entitled
15 "Different," told Harvard about how she initially felt like
16 an ethnic outsider because of her Latina heritage. When she
17 used advanced vocabulary, she was made fun of for talking
18 white. But she returned to her roots. She ultimately
19 embraced her heritage because it made her stronger, more
20 empathetic, a more critical thinker.

21 She told Harvard that she discovered her life's
22 ambition to represent her heritage and that she would carry
23 that pride with her to college if admitted.

24 And the evidence shows that Harvard took note, not
25 of a single fact about Itzel but of a complex picture, of a

1 complex young woman who Harvard decided would be a good fit.

2 The plaintiffs don't say that that these strengths
3 should not be valued, but their requested remedy would compel
4 universities to blind themselves to any reference to race.
5 This would systematically undervalue the contributions like
6 Itzel.

7 The harm would cut just as deep for American
8 students like Thang. Thang told Harvard that when he was
9 growing up, his Vietnamese identity felt lost in translation.
10 He told Harvard about his transformative growth, placing
11 pencils between his teeth to improve his pronunciation. And
12 he told Harvard that he reconnected with his Vietnamese
13 identity because it showed he had a strong sense of self.
14 Erasing Thang's ethnicity from his application file would
15 undercount his strengths as well.

16 The plaintiff's own expert agreed. Mr. Kahlenberg
17 conceded that admissions offices should be able to consider
18 whether an applicant has overcome racial discrimination.

19 Furthermore, the students show that even the
20 demographic check box can offer meaningful information.

21 Sarah wrote her essay on combatting gun violence in
22 Kansas City. She committed herself to this cause after a
23 close acquaintance was killed. And she presented the mayor
24 with six recommendations to end youth violence. Sarah never
25 mentioned her race in her essay, but she did mark the box

1 that she was African-American. This provides additional
2 context for Sarah's advocacy, and at trial Sarah agreed.

3 The second undisputed fact is that racial diversity
4 enriches the educational environment for all students. Every
5 single student testified to this fact. Thang explained that
6 his interactions with racially diverse students gave him a
7 tool set to think about cultural sensitivity which will make
8 him a better doctor. And this diversity benefits nonminority
9 students, too.

10 Sarah told this court that she was repeatedly
11 thanked by classmates for her contributions, including when
12 she specifically framed them as a black woman. Racial
13 diversity also matters for combatting racial hostility.

14 While Harvard has taken steps to better support
15 students of color, Itzel still felt stereotyped by classmates
16 who constantly questioned her: Were you born here? Are you
17 a citizen?

18 A staff member kicked Sally out of a student
19 lounge, presuming she was a trespassing tourist, making Sally
20 feel like a perpetual foreigner.

21 Cecelia Nunez shared about how a classmate called
22 her and her friends a bunch of wetbacks. The number of
23 minority students matters in these moments. Cecelia shared
24 that they could laugh off the racial slur because they were a
25 large group of students, but she acknowledged that they had

1 likely felt threatened had their numbers been lower.

2 The plaintiffs have suggested that these benefits
3 could be achieved without considering race, but they are
4 wrong because of the third undisputed fact.

5 Eliminating the consideration of race would sharply
6 reduce the number of black, Hispanic, and other minority
7 students on campus. Harvard's expert estimated that their
8 numbers would be cut in half, and the plaintiff's expert said
9 that their numbers would be cut by roughly 1,000 students on
10 campus.

11 All students would lose out from this decline. As
12 Sarah shared, there would be less learning because black and
13 Latinx students offer perspectives that make classes so much
14 richer. And Itzel explained that students of color are
15 driving many of the positive changes on Harvard's campus.

16 SFFA's expert, Mr. Kahlenberg, tries to erase these
17 harms by saying Harvard could achieve comparable benefits by
18 using race-neutral alternatives. But his alternatives do not
19 make up for the losses.

20 All of them reduce the share of black students.
21 This reduction would undoubtedly harm Harvard's
22 African-American students. Sarah needed a sufficient number
23 of same-race peers to lean on when Harvard's newspaper
24 published a racially bigoted article suggesting that
25 admitting black students to Harvard was like teaching a blind

1 person to be a pilot. This is a group that is already highly
2 marginalized on Harvard's campus. But this decline also
3 hurts every student.

4 Thang testified that the decline in black students
5 would hurt his education dramatically because it's their
6 advocacy that taught him how to build coalitions and how to
7 better address the health needs of people of color, including
8 his own Vietnamese community.

9 Another shortcoming, socioeconomic status cannot
10 serve as a proxy for race. As Itzel testified, ethnoracial
11 diversity is more visibly salient. When she entered a
12 classroom, she took note mentally of the number of nonwhite
13 students, and she intentionally sought out spaces with more
14 students of color because there she could finally breathe.

15 Kahlenberg himself admits that the most efficient
16 method for cultivating racial diversity is considering race,
17 not socioeconomic status.

18 Another major pitfall. It threatens to reduce the
19 diversity within each racial group. Asian-Americans vary
20 widely in their immigration histories, educational
21 opportunities, and countless other characteristics. As Thang
22 testified, Southeast Asian representation is lacking at
23 Harvard with fewer underrepresented Vietnamese students.
24 This often makes him feel erased. Thang explained
25 race-conscious admissions allows Harvard to take his

1 Vietnamese immigration history into account.

2 As a final problem, it's likely that the decline
3 would be even greater than estimated. Several students said
4 that if Harvard stopped considering race, minority students
5 would be less likely to apply and less likely to accept.

6 Taken together, these facts demonstrate racial
7 considerations are necessary. The remaining question is
8 whether Harvard's manner of considering it is individualized.

9 This question should also be resolved in their
10 favor based on three facts: Admitted black and Hispanic
11 students are eminently qualified regardless of race; Harvard
12 considers all pertinent elements of diversity; and Harvard
13 flexibly applies its positive appreciation of race across
14 students of all backgrounds. It does not award predetermined
15 points, and it is never a negative factor.

16 The plaintiffs say that race is the predominant
17 factor in admitting black and Hispanic students. The claim
18 is false, and Sarah's file shows why.

19 Harvard's readers made no comment about Sarah's
20 race. They do comment extensively on Sarah's extraordinary
21 achievements. And I've just pulled out a few highlights.
22 They praised Sarah's stellar academics and wide-ranging
23 extracurriculars. She earned straight As and A pluses in
24 high school while holding down a part-time job. The comment
25 about her character attributes are all backed up by glowing

1 recommendations.

2 And notably for this case, Harvard's readers
3 underlined that she exhibited leadership of a subtler,
4 quieter type, proof that "quiet" can be a positive term. The
5 comments also show Harvard's valuing a full range of
6 diversity attributes, noting Sarah's socioeconomic status,
7 her geographic ties, and even her parents' occupations, a
8 sign that Harvard does consider this information. And
9 Dr. Card's model is stronger for considering it, too.

10 Itzel's application reflects a similar pattern. It
11 is full of detailed commentary about the full spectrum of her
12 strengths. For Itzel, Harvard's readers did make two
13 references to her ethnicity, noting that she was connected to
14 her heritage after a period of disconnect, see PE.
15 Presumably PE is her personal essay entitled "Different."
16 This shows when Harvard's considering ethnicity, they're
17 viewing it in context.

18 To be clear, race may have played a limited role in
19 Itzel and Sarah's admission, but the plaintiff's argument
20 that race is the predominant factor is not only incorrect, it
21 unfairly erases the great weight of their accomplishments.

22 Just as importantly, there is nothing wrong with
23 considering race in a limited, reasonable way. Harvard is
24 admitting minority students who are making concrete
25 contributions to its educational goals based in part on their

1 race. Itzel vowed in her application to carry her Latina
2 pride to college, and she made good on this promise. She led
3 a coalition of students who established an ethnic studies
4 track at Harvard.

5 The recommendation letter from Sarah's school
6 counselor, including her response in a prior survey saying
7 that her greatest contribution in high school was loosening
8 the strong hold of stereotypes by providing her classmates
9 with an example of a working-class black woman who strives
10 for academic excellence.

11 Sarah continued to challenge stereotypes at
12 Harvard. She co-authored a diversity report. She served as
13 president of the Black Students Association. And when the
14 campus was shaken by the deaths of Michael Brown, Eric
15 Garner, and the slew of police shootings that followed, Sarah
16 led the rest of the campus in finding a path for her to mourn
17 and make meaning of the fact that black lives matter and how
18 to be better allies.

19 It's clear on this record that Harvard's process is
20 both necessary and highly individualized.

21 Turning briefly to the plaintiff's second legal
22 theory of intentional discrimination, the students offer
23 three observations.

24 First, the plaintiffs cannot evade the burden of
25 proving intent, and strict scrutiny does not apply.

1 Harvard's counsel covered this. So I'm going to move on to
2 the second observation.

3 The application files of the Asian-American student
4 Amici corroborate the testimony of Harvard's witnesses. If
5 Asian-American ethnicity is taken into account, it's always
6 seen in a positive light.

7 The reviewer who noted Thang's Vietnamese identity
8 and use of pencils used to improve his English also favorably
9 praised him for pushing himself academically and personally.

10 For Sally, the only reference to her Chinese
11 heritage were positive, and they were always tied to context.

12 The plaintiffs cannot erase entirely the
13 significance of these examples.

14 A third observation: The plaintiff's method of
15 proof overlooks the importance of non-academic factors. The
16 plaintiff's arguments about the personal score are not
17 persuasive because they overemphasize academic metrics.
18 Their expert throws out the personal score based on two
19 flawed analyses.

20 First, he points to differences in the personal
21 score when students are arranged by academic index, a score
22 based entirely on standardized test scores and grades. While
23 there may be racial variants, this does not show racial bias.
24 It simply demonstrates that the academic index is not
25 strongly related to the personal score. And those applicants

1 with midrange scores are more than academically qualified.

2 Take our students. Among the four, Thang had the
3 lowest academic index at 220, probably because of his
4 lower-end SAT score. According to the plaintiff's table,
5 this places him in the 5th decile. The plaintiffs have
6 derisively referred to this as a middle-of-the-pack score.

7 But Thang was more than academically qualified. He
8 had straight As in high school, graduated first in his
9 prestigious magnet program, and was a national AP scholar
10 with distinction. That's what qualifies as underqualified in
11 the SFFA model.

12 His academic index also says nothing about the
13 attributes relevant to the personal score, such as reaction
14 to setbacks and concern for others. Here, Thang excelled.
15 He overcame language barriers, and his school recommendations
16 stressed that he was an unusually caring individual with an
17 infectious happy personality.

18 There's also nothing suspicious about variation by
19 race. The academic index is highly driven by standardized
20 test scores which track privilege more than talent. Test
21 scores are racially skewed in large part because of racial
22 variation in wealth, which impacts who has access to
23 expensive test-prep programs.

24 Grades and coursework can also be racially skewed.
25 Several student Amici testified that teachers were less

1 likely to identify black and Latino students for gifted
2 coursework.

3 Dr. Arcidiacono also justifies throwing out his
4 personal score based on his regression analysis. But his
5 method selectively ignores some racial associations but not
6 others. All three of the rating regressions showed
7 associations with race. All three had no explanatory power.
8 They should be treated consistently.

9 Dr. Card did this. He adjusted his model for the
10 racial associations across all three of the ratings, and he
11 found no sign of discrimination.

12 Harvard's admissions system is not perfect. To be
13 clear, Asian-Americans overcome setbacks, display courage,
14 and make great leaders. But because of biases in the K-12
15 system, such attributes may show up in students' application
16 files at varying rates.

17 Teachers and counselors may offer effusive praise
18 of Asian-American students, but that praise may focus more on
19 their academic strengths and less on their reaction to
20 setbacks.

21 Think of Sally Chen. Her college counselor told
22 her not to write about her family's Asian immigrant story
23 because it was overdone. Fortunately, Sally did not heed
24 this advice. She wrote about it, received a high personal
25 score, and got in. But imagine if the counselor had

1 convinced Sally. And these are the very same counselors who
2 are writing recommendation letters for students.

3 Instead of perpetuating inequalities,
4 race-conscious admissions is one of the most important tools
5 for counterbalancing such biases. Harvard should continue to
6 refine its system to promote greater equity. It should
7 continue to train its staff to be more sensitive to the
8 challenges of all minority students. And it should and
9 legally may use race-conscious admissions as one of these
10 tools.

11 In sum, the plaintiffs cannot erase student stories
12 from the record, and it should not be permitted to erase the
13 appreciation of race in admissions.

14 The students trust that this Court's holistic
15 review of the evidence, much like Harvard's holistic
16 race-conscious process will honor their stories and preserve
17 diversity on Harvard's campus to cultivate the citizen
18 leaders that we need to lead in this stunningly diverse
19 world.

20 Thank you.

21 MS. HOLMES: Good afternoon, Your Honor, counsel.
22 I represent 25 Harvard student and alumni organizations as
23 Amici. These organizations represent thousands of
24 Asian-Americans, black, white, Latinx, and native students
25 and alumni who support Harvard's ongoing consideration of

1 race as one of many factors in its holistic admissions
2 system.

3 Your Honor heard from a few of these members who
4 testified during trial, as well as from witnesses from the
5 student Amici.

6 By contrast, as has been pointed out, no student
7 testified in support of SFFA's claims. The Court has our
8 proposed findings of fact and conclusions of law, but I would
9 like to highlight three crucial points in a case that has
10 become largely dominated by the battles of statistics.

11 First is to give a concrete picture of what is
12 meant by the educational benefits of diversity. In other
13 words, what would be lost should Harvard no longer be able to
14 cultivate this diversity.

15 The second is to expose the fallacy of race-neutral
16 alternatives. They have been studied, attempted, and
17 simulated. And the evidence in the record shows that there
18 are no workable alternatives through which Harvard can
19 generate sufficient educational benefits of diversity
20 compared to the limited consideration of race in admissions.

21 And finally, SFFA's push for a race-blind
22 admissions system disproportionately harms applicants and
23 students of color, including Asian-Americans.

24 One goal of the organizations I represent is to
25 make concrete what a diverse student body looks like. And

1 I'm focusing here on racial and ethnic diversity, although it
2 is true that other types of diversity are also important and
3 Harvard does consider those other types of diversity.

4 Our witnesses demonstrated how learning in a
5 racially diverse student environment shaped their educational
6 experiences. Their firsthand experience offers real-world
7 examples of the concepts described by Dr. Ruth Simmons, an
8 educator with decades of experience in college pedagogy and
9 administration, that, in her words, encountering difference
10 deepens student's learning, influences their academic and
11 career paths, and breaks down stereotypes to prepare them for
12 a future in a pluralistic and diverse society.

13 To highlight a few examples from the record, a
14 racially diverse student body enhances academic study. You
15 heard this from Thang Diep, who recalled hearing from a black
16 student in his public health class which helped open his eyes
17 to how medical studies can be racially biased and forming his
18 plans to be a pediatrician.

19 Or take Cecelia Nunez, whose experience before
20 Harvard was primarily with her own Mexican-American community
21 but came to Harvard and discovered other Latinx students from
22 a range of ethnic backgrounds and was inspired to focus on
23 Latin-American studies to explore the full breadth of this
24 diaspora.

25 Harvard as an institution also depends on a diverse

1 student body to become a school that is more responsive to
2 the needs of its students. For example, Harvard
3 administrators reached out to Sarah Cole, the president of
4 the Black Students Association, during a period of police
5 shootings of unarmed black men for help in communicating with
6 the student body about this sensitive issue.

7 Diversity on campus also fosters feelings of
8 representation, recognition, and solidarity. Madison Trice
9 spent years being the only black student in her high school
10 honors courses but was elated to arrive at Harvard and be
11 welcomed into an organization that celebrates black women and
12 all their multidimensional identities.

13 Diversity allows for coalition building and coming
14 together to tackle difficult topics. A group of
15 Asian-American students at Harvard started a coalition of
16 multiple student groups of color to push the Harvard
17 administration to establish an ethnic studies track and an ethnic
18 studies program, efforts that continue today.

19 And diversity promotes moments of interpersonal
20 revelation. Through late-night conversations with her black
21 roommate after an incident of police brutality against a
22 black student took place just steps from campus, Catherine Ho
23 learned about the emotional toll that the episode had taken
24 on the black student community.

25 This is precisely what the Supreme Court meant when

1 it says, in *Bakke*, "The atmosphere of speculation,
2 experiment, and creation so essential to the quality of
3 higher education is widely believed to be promoted by a
4 diverse student body." Justice Powell continued, "It is not
5 too much to say that the nation's future depends upon leaders
6 trained through wide exposure to the ideas and mores of
7 students as diverse as this nation of many peoples."

8 Without a diverse student body, the conversations,
9 educational epiphanies, moments of solidarity, challenges to
10 prior assumptions, or feelings of finally belonging cannot
11 happen. These educational experiences cannot be taught in
12 the classroom. Indeed, much of the work of translating
13 diversity into these benefits is shouldered by our client
14 organizations which bring people together across racial lines
15 for socializing, educational events, dialogue, and activism.

16 Even though they can't be quantified, the evidence
17 showed that these benefits are more than abstract concepts
18 and have real, lasting effects on students' educational
19 experiences and future potential. And we should tread very
20 carefully when we consider dismantling an admissions system
21 that has made them possible.

22 Turning to race-neutral alternatives, I will start
23 by pointing out that on the stand Mr. Kahlenberg agreed to
24 the eminently simple concept that the best and most efficient
25 method of promoting racial diversity in a student body is to

1 consider race in admissions. The evidence in the record
2 takes this further, demonstrating that it is a fallacy that
3 race-neutral alternatives are enough to produce a
4 sufficiently diverse class to foster the educational benefits
5 of diversity.

6 First, Harvard already employs numerous
7 race-neutral alternatives, such as an immense and targeted
8 recruitment apparatus, one of the most generous financial aid
9 programs in the country, strong consideration of low-income
10 and disadvantaged status in admissions, and extensive
11 resources put towards convincing admitted students to
12 matriculate.

13 Even if these practices remained in place,
14 according to Dr. Arcidiacono, if Harvard eliminated the
15 consideration of race in admissions, the number of black and
16 Latinx admitted students would fall by nearly 1,100 across
17 all four years. That is roughly half.

18 Mr. Kahlenberg agreed that this is unacceptable,
19 but his own proposals of race-neutral alternatives do not
20 fare much better. In each of his four main simulations, the
21 share of admitted black students would drop by nearly
22 one-third. And we must remember that this is the percentage
23 of admitted students, so the actual share of black student
24 enrollment would be even lower, in the single-digit
25 percentages, especially given that black students yield at a

1 lower rate.

2 As Mr. Lee mentioned, SFFA repeatedly characterizes
3 this reduction as slight. And shockingly, SFFA touts this
4 marginalization of Harvard's black student community as an
5 increase in diversity, claiming that there will be increases
6 to the Latinx or Asian-Americans share of admits. Our
7 clients would support this increase but not at the cost of
8 losing one-third of their black classmates.

9 In SFFA's view, apparently, diversity means that
10 people of color are fungible. You don't need a robust mix of
11 people from different backgrounds. You don't care about
12 diversity within each racial group, and you can squeeze out
13 one-third of the black community and pat yourself on the back
14 for increasing diversity.

15 Thankfully, under *Fisher*, Harvard and not SFFA has
16 a First Amendment right to define its educational mission and
17 pursue the type of robust diversity that supports that
18 vision.

19 But SFFA's ultimate failure here is that it does
20 not go past the numbers to consider the effect on actual
21 students. SFFA and Mr. Kahlenberg offer no evidence about
22 how the loss of one-third of admitted black students would
23 affect the educational benefits of diversity at Harvard.

24 Mr. Kahlenberg did not speak to any students,
25 faculty, or educational experts about this. And SFFA

1 presented no evidence on this issue. In its brief, SFFA
2 simply scoffed at the idea that there could be a negative
3 effect, calling it "not credible."

4 But the unrebutted evidence at trial shows
5 otherwise. Amici witnesses described their participation in
6 or their engagement with the black student community and the
7 detrimental effects a significant reduction in this community
8 would have on their Harvard experience.

9 These effects include fewer opportunities for
10 meaningful interactions that break down stereotypes, more
11 isolation of black students, and feelings of tokenism in the
12 classroom, a potential increase in racial hostility, less
13 diversity within the black student community because a
14 smaller community will likely not reflect the full range of
15 black experiences, fewer black students to help recruit and
16 welcome prospective students, and less capacity of cultural
17 organizations to promote dialogue and education that helps
18 expose students to people of different backgrounds and issues
19 faced by different communities.

20 On this last point, many black student
21 organizations such as our clients, the Black Students
22 Association and the Kuumba singers, for example, are some of
23 the more established organizations on campus with decades of
24 leadership at Harvard. They have served as models and paved
25 the way for a proliferation of cultural organizations. For

1 these organizations to lose membership and capacity would
2 have effects that reach beyond the black community, but it
3 would affect this entire network and also affect Harvard's
4 relationship with its students of color.

5 Harvard still has progress to make to become a more
6 inclusive place. There are still classes and spaces that
7 feel overwhelmingly white. Harvard still lacks an ethnic
8 studies program. There are still incidents of racial
9 hostility, and many complained about the school's inadequate
10 response to an incident of police brutality.

11 A significant reduction in the black student
12 community is antithetical to making progress on these issues.

13 And thus, Your Honor should reject SFFA's claims
14 that it has identified a race-neutral solution that works
15 about as well as the consideration of race in admissions
16 because there is no evidence that these alternatives can
17 foster diversity sufficient to reach -- sufficient to reap
18 its educational benefits.

19 Finally, at every step of this case, SFFA has
20 pursued its claims in ways that disadvantage students of
21 color. First, SFFA's intentional discrimination claim relies
22 heavily on comparing applicants on academic measures of
23 grades and test scores. But Harvard has never claimed that
24 these are the most important metrics in its admissions
25 determinations, especially when distinguishing between highly

1 competitive applicants.

2 One reason is because Harvard recognizes the
3 realities of our K-12 educational system in which black and
4 Latinx students disproportionately face barriers to
5 educational opportunity that may limit the degree to which
6 grades and test scores reflect their full academic potential.

7 And yet, SFFA overemphasizes grades and test scores
8 in its analysis, constantly comparing applicants by academic
9 index, even though Harvard does not even consider the
10 academic index in its admissions.

11 You've heard from student witnesses of many races,
12 and they are all highly qualified with stellar academic and
13 non-academic credentials. Hearing their pre-Harvard
14 accomplishments, scores, and resumes, it is clear that to the
15 extent that race was considered this their admission, it was
16 simply a plus factor that helped add context to their
17 stories, the cherry on top of a great application.

18 But SFFA's focus on academic measures devalues the
19 non-academic strengths of those applications, which are can
20 sometimes be the credentials that allow black and Latinx
21 applicants to show their full potential.

22 Second, race-conscious admissions allow Harvard to
23 consider the full lived experiences of applicants of color,
24 whose experiences may often be illuminated by their racial or
25 ethnic identity. If Harvard no longer considered race in

1 admissions, it could signal to these applicants that the
2 school doesn't value these experiences or might not even
3 consider compelling stories of adversity or identity or
4 immigrant background that are inextricably tied to race.

5 This would hurt Asian-American applicants just as
6 much as other applicants of color.

7 Finally, under all the expert analysis in this
8 case, Dr. Card, Dr. Arcidiacono, and Mr. Kahlenberg, if you
9 remove the consideration of race, almost any way you slice
10 the data, the groups that suffer in the admissions process
11 are primarily black and Latinx applicants.

12 SFFA's claim is premised on alleged discrimination
13 against Asian-American applicants compared to white
14 applicants. And yet white applicants do not bear the brunt
15 of the burdens of their proposed alternatives or remedies.
16 Indeed, in some of the analyses, white applicants are the
17 primary beneficiaries.

18 It is hard to believe that SFFA has pursued this
19 case in order to turn away the wolf of racial bias when
20 SFFA's claims, analyses, and remedies seem so slanted against
21 students and applicants of color.

22 On a final note, since its inception, my
23 organization, the NAACP legal defense fund, as well as the 25
24 organizations we represent, has been committed to racial
25 equality. We unequivocally denounce discrimination against

1 any group. We are also well aware of the burden that civil
2 rights plaintiffs shoulder in bringing intentional
3 discrimination cases under Title VI.

4 SFFA bears that burden in this case, but it has
5 attempted to evade its obligation by twisting the law to
6 argue that the burden should shift onto Harvard to disprove
7 discrimination simply because Harvard has a race-conscious
8 admissions policy, even though that policy has been approved
9 by Supreme Court precedent.

10 SFFA's legal gymnastics are revealing because this
11 case is not really about intentional discrimination. It is
12 an attack on Harvard's ability to provide a racially
13 inclusive and diverse educational environment from which all
14 students benefit. The subtext of SFFA's argument is that any
15 race-conscious admissions policy is tantamount to
16 discrimination. But that premise is not borne out by the
17 evidence in this case and conflicts with Supreme Court
18 precedent.

19 And it is deeply ironic that under the guise of
20 Title VI of the Civil Rights Act of 1964, SFFA would attempt
21 to ban a civil rights policy that is intended to advance
22 equity in higher education, without which Harvard would be a
23 of whiter, more closed institution.

24 Thank you.

25 MR. MORTARA: Your Honor, subject to the computer,

1 I'm ready to go.

2 Ms. Daly, are you?

3 Your Honor, while the screen is adjusting, I think
4 you've learned a little bit about me personally in the course
5 of this case. I hadn't told you yet that my wife, Mary
6 Swietnicki, and I have ten nieces and nephews. Four of them
7 are Chinese-Americans. My daughter has four Chinese-American
8 cousins. Mary's brother married a Chinese-American woman.

9 And I'm here to tell you I'm part of the community
10 of Americans waiting to hear why it is that Asian-Americans
11 got not marginally lower personal ratings, statistically
12 significantly lower personal ratings than white applicants.
13 It is undisputed in this case, and we still haven't been told
14 why.

15 I get it, Your Honor, from listening to Mr. Waxman
16 in particular, I have failed my own family because we are the
17 gang that can't shoot straight. We allegedly have told you
18 all sorts of inconsistent things.

19 But if you remember Tab 12 of your binder and the
20 *Thomas* case, it is not inconsistent to talk about intentional
21 discrimination. I will say it again. Harvard intentionally
22 discriminated in this case. It's not inconsistent to follow
23 that up with statements that it could have happened because
24 of implicit bias, and it could have happened because of
25 racial stereotyping.

1 None of those things are inconsistent with one
2 another. The *Thomas* versus Eastman Kodak case says they are
3 all the same. And I'll say it all again. Harvard
4 intentionally discriminated in this case against
5 Asian-American applicants.

6 And right behind that, Your Honor, you know you
7 don't have to find that Harvard's witnesses were liars and
8 perjurers, even when they said they never used race in the
9 personal rating.

10 That's what *Thomas* is all about. Cognitive biases
11 that cause people to do things that they come in here and
12 they can't even explain.

13 None of them could explain why Asians were getting
14 lower personal ratings, but they are. How is it happening?
15 Why is it happening? We still haven't heard.

16 What we have heard is a lot of confusion and more
17 two plus two equals five about the law. I heard Mr. Waxman
18 say that *Gratz* is not an intentional discrimination case.

19 Let's check. Here's the Supreme Court decision in
20 *Gratz*, and I just am going to go to the very beginning of
21 Chief Justice Rehnquist's majority opinion. This is a case
22 about alleged violations of the equal protection clause and
23 what Title VI of the Civil Rights Act of 1964.

24 And what's the conclusion? The program in the
25 University of Michigan *Gratz* case violated these

1 constitutional and statutory provisions.

2 The last I checked, Title VI only bans intentional
3 discrimination. *Gratz* absolutely is an intentional
4 discrimination case. All we heard just now was another
5 episode of two plus two equals five. And Harvard is even
6 move confused about other areas of discrimination law.

7 If you took seriously everything they were saying,
8 they'd be overturning about 40 years of discrimination case
9 law or trying to make Title VI different from Title VII in
10 some way nobody could possibly explain. They're right next
11 to each other, in the same act and are modeled after one
12 another.

13 First, we somehow need to show you direct evidence
14 of discrimination? Not according to the Third Circuit in
15 *Aman v Cort Furniture*. Let's take a look at that. This is
16 *Aman v Cort Furniture Rental* from the Third Circuit. And
17 what did they say on the subject where we were criticized for
18 no direct evidence.

19 Here's what they said: "As one court has
20 recognized, defendants of even minimal sophistication will
21 neither admit discriminatory animus or leave a paper trail
22 demonstrating it."

23 I think we can all agree Harvard and its admission
24 personnel are more than minimal sophistication. We need to
25 have anecdotal evidence? Really? What did the D.C. Circuit

1 say about that in the *Segar* case. This is the *Segar* case
2 from the D.C. Circuit.

3 And over in that case, around about Headnote 36,
4 statistics of course are not irrefutable, citing *Teamsters*,
5 but when a plaintiff's statistical methodology focus on the
6 right things, the appropriate labor pool, and generates
7 evidence of discrimination at a statistically significant
8 level, no sound policy reason exists for subjecting the
9 plaintiff to the additional requirement of either providing
10 anecdotal evidence or showing further gross disparities.
11 Such a rule would reflect little more than a superstitious
12 hostility to statistical proof, a preference for the
13 intuitionistic and individualistic over the scientific and
14 systematic.

15 We are rolling back the decades in employment
16 discrimination law every time Harvard stands up, or we're
17 just deciding that Title VI is somehow different. Courts
18 cite Title VII cases and Title VI cases interchangeably every
19 single week in this country.

20 Now, Your Honor, I did say something -- I did say
21 we didn't think much of the anecdotes because Harvard's
22 cherry-picked set of applications that they gave us --
23 remember, we picked applications from behind the veil of
24 ignorance as to what they said. They had all the
25 applications when they picked them.

1 The anecdotes don't mean of because we didn't get a
2 statistically relevant sample of applications. And I did say
3 that. We don't think much of the anecdotal evidence, and
4 that includes the ice skater, Your Honor, to be candid. I
5 never once said, we never once said our nonstatistical
6 evidence doesn't amount to much.

7 Your Honor, maybe we've got disagreements between
8 the Court and SFFA. We certainly have them with our friends
9 from Harvard. But we produced a mountain of nonstatistical
10 evidence. OIR, the new reading procedures, the emails, Utah,
11 etc., the stereotypical notes on the dockets. It's different
12 to call an Asian-American applicant quiet than to call a
13 Hispanic applicant quiet. One is a racial stereotype, one
14 isn't. What OCR found.

15 Your Honor, we are constantly being told that we
16 should have dragged Students for Fair Admissions standing
17 members in here and put them on the stand. I know no one
18 from Harvard or its legal team would have done the kinds of
19 things that Ms. Fisher experienced for her being a plaintiff
20 in a case like this.

21 But I think you can understand -- I think everyone
22 here can understand what people online -- what the online
23 community has done and the way things have gotten in our
24 country and what would have happened to these young people.

25 We all know -- none of us in here would have done

1 it, but somebody would have done something horrible to one of
2 our students if they'd stood there and done that. And we
3 didn't have to, and we didn't. Nothing in the law says we
4 had to bring our kids in here to suffer the slings and arrows
5 rather than the adulation that is poured on others who
6 support Harvard.

7 And we're very proud of the students who testified
8 as well.

9 There's room for disagreement about these deep,
10 deep questions. But I think we can put aside the idea that
11 legally or for any other reason we needed to have our members
12 testify.

13 I want to move on to the Office of Institutional
14 Research because I just heard that Plaintiff's Exhibit 28,
15 the so-called follow-up analysis, put Dean Fitzsimmons at
16 ease.

17 Let's take a look at that. Here's the follow-up
18 analysis. We did not see the coefficients on the screen,
19 Your Honor. Follow-up analysis tells you basically the same
20 story, intent to help athletes, intent to help
21 African-Americans. I won't do the whole staccato
22 presentation again.

23 There's the thing allegedly put Dean Fitzsimmons at
24 ease. Oh, we gave a plus to low-income Asians.

25 Right down below is a massive minus for

1 non-low-income Asians. 82 percent of the Asian applicants to
2 Harvard are not low income. And this is not a statistically
3 significant finding of a correlation, not at all.
4 Statistical significance in a regression model equals intent.
5 Wrong again, Harvard.

6 Let's take a look at *Fudge v Providence Fire* from
7 the First Circuit. "When statistical tests sufficiently
8 diminish chance as a likely explanation, it can then be
9 presumed that an apparently substantial difference in pass
10 rates here is attributable to discriminatory bias."

11 Regressions show intent. Not just disparate
12 impact. Dean Fitzsimmons knew that. He saw those
13 coefficients. He wasn't put at ease by a plus for low-income
14 Asians. Standing right next to it is an even bigger, even
15 bigger minus for non-low-income Asians. Instead of being
16 minus .037 now, it's minus .46789, even bigger.

17 Your Honor, I'm going to wrap up, not even taking
18 close to my time, but I am going to talk a little bit about
19 the personal rating.

20 I cannot make Harvard answer our questions. But
21 you have not heard any answer to the racial pattern in the
22 personal rating. Will someone please tell us why
23 African-Americans and Hispanics get these huge boosts in the
24 personal rating? It's undisputed they do better than
25 everyone else, whites and Asians. No one has ever adequately

1 explained that to you. You weren't shown school support
2 ratings or non-academic ratings or anything else explaining
3 the racial pattern in the personal rating. You were given,
4 at best, a partial explanation for the differences between
5 Asians and whites. But it's incomplete, for the reasons I
6 gave.

7 Professor Arcidiacono's model showed you all the
8 ratings variables going into his model of the personal
9 rating. And it's true, Your Honor, a little bit, that the
10 academic ratings don't matter as much for the personal
11 rating. That's all taken into account in the model. Let me
12 take you back there.

13 You see the model that just includes academic
14 variables, model 2? It's not very good. R-squared value, a
15 pseudo R-squared value of .2, it's considered the gold
16 standard. That's the McFadden paper I discussed with
17 Professor Card.

18 Once you get above .2, that's a good fit. The
19 first model with just the academic variables isn't a great
20 fit. The model takes into account the relatively weak
21 correlation, if there still is one, the relatively weak
22 correlation between academics and the personal rating. And
23 it rolls it all in.

24 So by the time you get to model 5, you've got
25 whatever contribution academics makes, small though it may

1 be, and all the contributions of school support, alumni
2 interview, and everything else that Mr. Waxman called
3 non-academic, none of which explained the rank hierarchy
4 we've shown you time and time again.

5 They have never bothered to tell you why it is
6 African-Americans do better than Hispanics, do better than
7 whites, do better than Asians. Not once. There is no
8 explanation other than what Mr. Luby said the first time when
9 he told the truth, Harvard uses race in the personal rating.

10 And if so, I don't know what else we need to do
11 other than keep putting up Professor Card's own testimony
12 about how he treated the overall rating.

13 And now we're given the story that the personal
14 rating has all this good, extra data in it, and why would we
15 get it out of the model. The overall rating has all sorts of
16 good, extra data in it. It's the admissions officers
17 assessment of the ultimate likelihood that the candidate will
18 be admitted taken into account every single thing in the
19 application.

20 Nevertheless, because Harvard told Professor Card
21 that they were using preferences in the overall rating as
22 opposed to what they hid from him about the personal rating,
23 Card pulled it out of his model. There's no rationale for
24 not doing the same thing to the personal rating that he did
25 to the overall rating. I've shown it dozens of times.

1 So now what do we get? We get the virtual rating
2 model. This is a model no one believes is accurate. You
3 have to give Asians artificially low academic ratings and
4 artificially low extracurricular ratings while boosting the
5 ratings of other groups like African-Americans and Hispanics,
6 giving everybody false ratings.

7 At the same time, you don't bother to racially
8 correct the overall rating where there's an undisputed Asian
9 penalty, and you don't bother to racially correct the school
10 support ratings where there's an undisputed racial penalty.

11 The virtual rating model is junk. Dr. Card had it
12 right when he talked the first time about the overall rating
13 and why he took it out. And by implication, if you find race
14 influences the personal rating, it's got to come out.

15 I want to close on what we heard from Harvard.
16 Instead of omitted-variable bias, it's now missing relevant
17 factors.

18 Your Honor, the law in discrimination cases is that
19 a defendant cannot look at a statistical analysis like
20 Dr. Card's own analysis without the personal rating or like
21 Professor Arcidiacono's models of the personal rating, and
22 say that doesn't prove anything, it must be some other
23 variable.

24 And don't just take my word for it, like Mr. Waxman
25 standing up here and telling you Gratz is not an intentional

1 discrimination case. Let's look at the *Palmer* case from the
2 D.C. Circuit. We'll go there together.

3 This is *Palmer v Schultz* from the D.C. Circuit. As
4 I said, decades of discrimination law. It's discussing the
5 *Bazemore* case from the Supreme Court, a pattern or practice
6 case involving race discrimination.

7 *Bazemore* instructs lower courts to be cautious
8 about dismissing plaintiff's statistical studies as not
9 probative simply because Harvard offers some
10 nondiscriminatory explanation for the disparity shown.

11 Implicit in the *Bazemore* holding is the principle
12 that a mere conjecture or assertion on Harvard's part that
13 some missing factor would explain the existing disparities
14 between Asians and white applicants generally cannot defeat
15 the inference of discrimination created by plaintiff
16 statistics.

17 To be sure, as the Supreme Court acknowledged in
18 *Bazemore*, there may be a few instances in which the relevance
19 of a factor to the selection process is so obvious that the
20 defendants merely pointing to its omission can defeat the
21 inference of discrimination created by plaintiff statistics.

22 The logic of *Bazemore*, however, dictates that in
23 most cases what a defendant cannot rebut statistical evidence
24 by mere conjectures or assertions without introducing
25 evidence to support the contentions that the missing factor

1 can explain the disparities as a product of a legitimate,
2 nondiscriminatory selection criterion without introducing
3 evidence that Asian essays are worse than whites, without
4 introducing evidence that something in these recommendation
5 letters tells Harvard that Asian applicants are less
6 likeable, kind, have less integrity, less grit, or just have
7 inferior personal qualities.

8 I asked a question. We are asking a question. Why
9 did Harvard give Asian applicants lower personal ratings? We
10 have not yet received an answer other than answers that
11 decades of discrimination case law say are not good enough.

12 Your Honor, I have to address the ALDC point.
13 We're all big fans of PowerPoint in here, but one thing you
14 can do with PowerPoint is you can cut off statements and
15 conceal the full context, and that's exactly what happened
16 with the ALDC issue from our findings of fact.

17 As Your Honor knows, we don't allege that the ALDC
18 Asians suffer a discriminatory admissions outcome penalty.
19 Everyone agrees they suffered some kind of personal rating
20 penalty, which we say just proves our point about stereotypes
21 being applied.

22 And then later on when they get into full committee
23 or subcommittee, wherever it is, somebody says let's pull
24 that candidate up, he's one of us, he's one of ours, he's or
25 she's got that Harvard DNA.

1 Mr. Lee put on the screen -- I can't remember if it
2 was Mr. Lee or Mr. Waxman -- Harvard does discriminate
3 against Asian ALDCs, pulled completely out of context from
4 Paragraph 274 of our brief where we acknowledge that there is
5 no admissions penalty outcome on Asian ALDCs, but there is a
6 penalty on the personal rating.

7 It's right here. If you take a look, Harvard does
8 not appear to impose an admissions penalty on Asian-American
9 ALDCs.

10 We are not the gang that cannot shoot straight. We
11 have not been inconsistent. And I hope we have not failed
12 and I have not failed my nieces and nephews.

13 Thank you, Your Honor.

14 THE COURT: All right. Thank you all again. As
15 usual, the arguments were of the highest caliber and
16 edifying. Thank you. We'll get to work on this. Thanks,
17 everyone.

18 (Court recessed at 4:32 p.m.)
19
20
21
22
23
24
25

CERTIFICATION

I certify that the foregoing is a correct
transcript of the record of proceedings in the above-entitled
matter to the best of my skill and ability.

/s/ Joan M. Daly

February 14, 2019

Joan M. Daly, RMR, CRR
Official Court Reporter

Date